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United States
Circuit Court of Appeals
For the Ninth Circuit.

PARMER A. GILLESPIE, executor of the
estate of Maud Gillespie, deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the
United States Board of Tax Appeals.

FILED

OCT - 1 1941

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

MAUD GILLESPIE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
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Upon Petition to Review a Decision of the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

HAROLD E. RORSCHACH.

For Commissioner:

STANLEY B. ANDERSON,

E. M. WOOLF, Esq.

Docket No. 98770

MAUD GILLESPIE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1939

May 25—Petition received and filed. Taxpayer notified. (Fee paid).

May 25—Copy of petition served on General Counsel.

May 25—Request for hearing in Tulsa, Okla., filed by taxpayer. 5/25/39 copy served.

July 5—Answer filed by General Counsel.

July 10—Notice issued placing proceeding on Tulsa, Okla., Calendar. Copy of answer served.

Dec. 4—Motion for leave to file amended petition, amended petition lodged, filed by taxpayer. 12/5/39 granted.

Dec. 6—Copy of motion and amended petition served on General Counsel.

1940

- Jan. 3—Answer to amended petition filed by General Counsel.
- Jan. 8—Copy of answer to amended petition served on taxpayer.
- Feb. 17—Hearing set May 13, 1940, Oklahoma City, Okla.
- Mar. 19—Application for order to take depositions of Maud Gillespie, filed by taxpayer.
- Mar. 27—Order to take depositions of Maud Gillespie, entered.
- Apr. 11—Motion to amend order to take depositions to permit the taking of the deposition of Chas. D. Green in addition to Maud Gillespie filed by taxpayer.
- Apr. 15—Order that the order to take depositions issued 3/27/40 be amended to provide for the taking of deposition of Maud Gillespie on April 27, 1940 instead of April 26, 1940, entered.
- Apr. 15—Order to take depositions of Chas. D. Green, entered.
- May 1—Depositions of Chas. D. Green and Maud Gillespie filed (1). Notary served parties.
- May 16—Hearing had before Mr. Hill on the merits. Submitted. Depositions of Chas. D. Green and Maud Gillespie received. Entry of appearance of Harold E. Rorschach, Esq., motion to file amendment to petition granted. Stipulation Facts—Motion to file amendment to petition and amendment to

petition filed at hearing. Briefs due 45 days simultaneously. Reply brief due 15 days. [1*]

1940

June 4—Transcript of hearing 5/16/40 filed.

June 28—Answer to amendment to amended petition filed by General Counsel. 6/29/40 copy served.

June 29—Brief filed by taxpayer. 7/1/40 copy served on General Counsel.

July 1—Brief filed by General Counsel.

July 15—Reply brief filed by taxpayer.

1941

Jan. 22—Findings of fact and opinion rendered, Hill, Div. 2. Decision will be entered under Rule 50.

Feb. 19—Computation of deficiency filed by General Counsel.

Feb. 19—Motion for reconsideration filed by taxpayer. 3/19/41 Denied.

Feb. 19—Brief in support of motion for reconsideration filed by taxpayer.

Feb. 24—Hearing set March 19, 1941 on settlement.

Mar. 3—Motion for entry of decision under Rule 50 filed by taxpayer. 3/4/41 copy served on General Counsel.

Mar. 19—Hearing had before Mr. Arundell on settlement under Rule 50. Petitioner agrees to respondent's recomputation. Referred to Mr. Hill for decision.

*Page numbering appearing at top of page of original certified Transcript of Record.

1941

Mar. 20—Decision entered, Sam B. Hill, Div. 2.

June 19—Petition for review by United States Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

June 19—Proof of service filed by taxpayer.

June 25—Affidavit of service of petition for review filed.

July 14—Designation of contents of record filed by taxpayer—with proof of service thereon.

[2]

United States Board of Tax Appeals

No. 98770

MAUD GILLESPIE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IT:R:E:2, OMS-90D, dated March 2, 1939, and as a basis of her proceeding, alleges as follows:

1. The address of the petitioner is 712 North Roxbury Drive, Beverly Hills, California.

2. The notice of deficiency, a copy of which is hereto attached, marked Exhibit "A", was mailed to the petitioner on March 2, 1939, by registered mail. [3]

3. The tax in controversy is income tax for the calendar year 1935. The deficiency asserted in the ninety-day letter is \$1,476.55, which is the amount in controversy.

4. The determination of the tax as set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in including in taxpayer's gross income the sum of \$17,666.25 received from F. A. Gillespie & Sons Company during the year 1935.

(b) In the alternative, if the Honorable Board determines that any part of the sum of \$17,666.25 received by Maud Gillespie from F. A. Gillespie & Sons Company during the year 1935 is taxable, then only such portion of \$17,666.25 is taxable as represents 3% of what an annuity would have cost at May 15, 1929 as would have produced the sum of \$15,000 per annum during the lifetime of Maud Gillespie.

5. The facts upon which the petitioner relies in support of the foregoing assignments of error, and as a basis of this proceeding, are as follows:

(a) On the 9th day of February, 1921, a certain trust agreement was entered into by which F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie entered into a

certain Declaration of Trust. A true copy of said Declaration of Trust is attached hereto, marked Exhibit "B". [4]

On the 15th day of May, 1929, F. A. Gillespie and Maud Gillespie entered into a certain agreement, copy of which is attached hereto and marked Exhibit "C".

On the 15th day of May, 1929, a certain Agreement was entered into between F. A. Gillespie, Maud Gillespie and F. A. Gillespie & Sons Company, a copy of which agreement is attached hereto marked Exhibit "D".

Pursuant to the terms of the foregoing agreement, F. A. Gillespie and Maud Gillespie delivered to F. A. Gillespie & Sons Company property having a value materially in excess of the cost of purchasing an annuity upon the life of F. A. Gillespie which would pay him the sum of \$15,000 per year and an annuity upon the life of Maud Gillespie which would pay her the sum of \$15,000 per year or \$25,000 per year for life.

Pursuant to the terms of the foregoing agreement, F. A. Gillespie & Sons Company paid over to Maud Gillespie during the year 1935 the sum of \$17,666.25.

(b) Maud Gillespie, nee Maud McCoy was born in Oil City, Pennsylvania on June 9, 1872. She received the sum of \$17,666.25 during the year 1935 from F. A. Gillespie & Sons Company under and by virtue of the contracts entered into and attached hereto marked Exhibits "B", "C", and "D". An

annuity could have been purchased on May 15, 1929 upon the life of a female individual born on June 9, 1872, which would have paid \$15,000 per annum to said female individual for life for the sum of \$196,537.50. An annuity could have been purchased on [5] May 15, 1929 upon the life of a female individual born on June 9, 1872, which would have paid \$20,000 per annum to said female individual for life for the sum of \$262,550.00. An annuity could have been purchased on May 15, 1929 upon the life of a female individual born on June 9, 1872 which would have paid \$25,000 per annum to said female individual for life for the sum of \$327,562.50.

F. A. or Frank A. Gillespie was born in Venango City, Pennsylvania on April 22, 1868. An annuity could have been purchased on May 15, 1929 upon the life of a male individual born on April 22, 1868 which would have paid the sum of \$15,000 per annum to said male individual for life for the sum of \$153,750.00.

Wherefore, Petitioner prays that the Board may hear this proceeding and determine that there is no deficiency.

(Signed) HAROLD E. RORSCHACH,
Counsel for Petitioner,
529 McBirney Building,
Tulsa, Oklahoma. [6]

State of California,
County of Los Angeles—ss.

Maud Gillespie, of lawful age, being first duly sworn upon oath, deposes and says that she is the

taxpayer named in the foregoing petition and that she has read said petition and is familiar with the statements therein contained and that the facts therein stated are true, except such facts as are stated to be upon information and belief and those facts she believes to be true.

(Signed) MAUD GILLESPIE

Subscribed and sworn to before me this 11th day of May, 1939.

[Seal] (Signed) HELEN GILBERT,
Notary Public.

My commission expires: Jan. 20, 1943. [7]

EXHIBIT "A"

1467M

SN-IT-1

Treasury Department
Washington

March 2, 1939

Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
And Refer to

Mrs. Maud Gillespie,
712 North Roxbury Drive,
Beverly Hills, California.

Madam:

You are advised that the determination of your income tax liability for the taxable year(s) ended

December 31, 1935, discloses a deficiency of \$1,476.55, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetyeth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By JOHN R. KIRK, (Signed)

Deputy Commissioner.

Enclosures:

Statement

Form of Waiver [8]

STATEMENT

IT:R:E:2

OMS-90D

Mrs. Maud Gillespie,
712 North Roxbury Drive,
Beverly Hills, California.

Tax Liability for Taxable Year Ended
December 31, 1935

Income Tax

Liability—\$1,476.55

Assessed—None

Deficiency—\$1,476.55

This determination of your income tax liability
has been made upon the basis of information on
file in this office.

Adjustment to Net Income

Net income as disclosed by return.....	(\$ 209.29)
Unallowable deduction and additional income:	
Annuities	17,666.25
Net income adjusted.....	<u>\$17,456.96</u>

Explanation of Adjustment

In accordance with the decision of the United States Board of Tax Appeals in the case of F. A. Gillespie for the year 1934 (38 B. T. A. 6 73) the annuity of \$17,666.25, received from F. A. Gillespie and Sons Company, Tulsa, Oklahoma, is taxable to you under the provisions of section 22(b)(2) of the Revenue Act of 1934.

Computation of Tax

Net income adjusted.....	\$17,456.96
Less:	
Personal exemption	1,000.00
	<hr/>
Income subject to surtax.....	\$16,456.96
Less:	
Earned income credit.....	300.00
	<hr/>
Net income subject to normal tax.....	\$16,156.96
	[9]
Normal tax at 4% on \$16,156.96.....	\$ 646.28
Surtax on \$16,456.96.....	830.27
	<hr/>
Total tax liability.....	\$ 1,476.55
Income tax assessed, account #661661.....	None
	<hr/>
Deficiency of income tax.....	\$ 1,476.55
	[10]

EXHIBIT "B"

DECLARATION OF TRUST

Know All Men by These Presents:

That, Whereas, on the 24th day of April, A. D., 1920, there was duly organized and created the F. A. Gillespie and Sons Company, a corporation, duly organized, created and existing under and by virtue of the laws of the State of Oklahoma, with a Capital Stock of One Million Dollars (\$1,000,000.00) divided into Ten Thousand (10,000) shares, of the par value of One Hundred Dollars (\$100) each; and,

Whereas, several years prior thereto the undersigned Settlor, Donor and Trustee, F. A. Gillespie,

had agreed to, and did, convey and transfer the equitable title to certain interests, respectively, in and to a part of the properties later conveyed by said F. A. Gillespie to said corporation, to be paid for as provided, to Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie, the wife and sons of said Settlor, Donor and Trustee, F. A. Gillespie; and,

Whereas, said F. A. Gillespie and Sons Company has issued to said F. A. Gillespie, in his own name, and standing in his individual name, Nine Thousand, Nine Hundred and Eighty (9,980) of said Capital Stock of said F. A. Gillespie and [11] Sons Company, and Five (5) Shares thereof to Maud Gillespie, Five (5) Shares thereof to B. A. Gillespie, Five (5) Shares thereof to L. A. Gillespie, Trustee for said P. A. Gillespie, and said Capital Stock of and in said Corporation is now so held; and,

Whereas, it is the desire of the undersigned Settlor, Donor and Trustee to recognize and maintain the interests, respectively, equitably belonging to said Maud Gillespie, B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, to be paid for as originally arranged, when so conveying and arranging said equitable titles, and to hold said Shares of Capital Stock, as hereinafter set forth, under the terms, conditions and provisions of the Trust Estate, or Trust, hereinafter set forth;

Now, Therefore, By These Presents, I do hereby declare that I stand seized and possessed of, and

have and hold, Nine Thousand Nine Hundred and Seventy-five (9,975) Shares of the Capital Stock of the said F. A. Gillespie and Sons Company, a corporation, organized, created and existing under and by virtue of the laws of the State of Oklahoma, aforesaid, in trust, having and holding One Thousand, Nine Hundred and Ninety-Five (1,995) thereof as Trustee, and in Trust, for said Maud Gillespie, One Thousand, Nine Hundred [12] and Ninety-Five (1,995) thereof as trustee and in trust, for said B. A. Gillespie; One Thousand Nine Hundred and Ninety-Five thereof as Trustee, and for said L. A. Gillespie; One Thousand Nine Hundred Ninety-Five (1,995) thereof as Trustee and in trust for said P. A. Gillespie, and One Thousand Nine Hundred and Ninety-Five (1,995) thereof as Trustee, and in trust, for said F. A. Gillespie, for the duration and under and upon the terms, conditions and provisions hereinafter set forth, as follows, to-wit:

1. Said shares of said Capital Stock shall, and will be held by said F. A. Gillespie, and his successor or successors, as such Trustee or Trustees, during the life-time of said Maud Gillespie, B. A. Gillespie, L. A. Gillespie, and each of said beneficiaries shall at all times be entitled to all the dividends, for the natural life of each of them, respectively, cash, stock, bonds, or otherwise, accruing and divided and paid, on and from the respective number of shares so held in trust for each of them, respectively, and each shall have a like interest in the surplus, accretions and properties secured by, and

added to said corporation, during the lifetime of each of them, respectively, and during the continuance of this Trust, and Trust Estate. [13]

2. Said F. A. Gillespie shall be and act as such Trustee during his lifetime, and, upon his death, said Maud Gillespie, B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, or such of them as shall be then surviving, at the time of the death of said F. A. Gillespie, shall succeed said F. A. Gillespie, and shall thereafter act and be such Trustee or Trustees, and, upon the death of any of such Trustees, respectively, the survivor or survivors thereof shall be and act as such Trustees or Trustee.

3. Said F. A. Gillespie, during his lifetime, as such Trustee, shall have the absolute control of said Stock of said beneficiaries, so held by him in trust, and he may allow the same to stand on the books of said Company in his individual name, or may have the same transferred to him, as Trustee, as he shall decide and determine, but in either event, during his lifetime, he shall have the absolute power to vote such stock, as he shall deem fit and proper, and shall not, in any way, be controlled by the beneficiaries in voting the same.

4. In the event that said beneficiaries Maud Gillespie or F. A. Gillespie, or both, should die, leaving the other beneficiaries, or a part thereof, surviving them, or either of them, then the surviving beneficiaries hereunder shall have and take the share or shares of said beneficiary or beneficiaries, share and share alike, each surviving beneficiary [14] or bene-

ficiaries receiving an equal and like part, and said stock of said beneficiary or beneficiaries shall then and there become and be, and remain, a part of this Trust Estate, or Trust, and shall be further administered, under the terms hereof, for and during the lifetime of such surviving beneficiaries, as herein provided for.

In the event that said beneficiaries B. A. Gillespie, L. A. Gillespie and P. A. Gillespie, or either, or all of them should die, before the termination of this Trust Estate, or Trust, with children or issue of their own bodies, respectively surviving them, respectively, then such children or issue shall have and take, share and share alike, under the terms of this Trust Estate or Trust, the shares of said Capital Stock held, in trust, hereunder, for such beneficiary or beneficiaries, respectively, and the part or portion of said shares of said capital stock of any predeceased beneficiary or beneficiaries hereunder, passing to such children or issue, shall then and there become and be, and remain, a part of this Trust Estate, or Trust, and shall be administered, under the terms hereof, for and during the continuance of this Trust Estate or Trust.

5. Said Settlor, Donor and Trustee, F. A. Gillespie, hereby reserve the full right, power and authority, during [15] his lifetime, and while being and acting as said Trustee, to sell, dispose of and convey said Shares of Stock, and to reinvest the funds secured therefor, in such other form or Trust or Trust Estate, as he may deem best so to do, pre-

serving, however, at all times the due proportions of interests, respectively, as herein provided for, and likewise to change the form and investment of this Trust Estate, or Trust, as to him shall seem meet and proper, so preserving at all time, said due proportions of interest, respectively, as herein provided for.

6. Said beneficiaries, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie shall not have any right, power or authority, jointly or severally, to sell, convey, transfer, pledge, incumber, mortgage, or in any way dispose of, the whole or any part of the shares of Capital Stock held hereunder, in trust, for them, and each of them, nor the dividends and income accruing by and from said shares of Capital Stock, and said Shares of Capital Stock, so held in trust for them, respectively, and said dividends and income, and every interest therein and thereto, shall at all times be free from, and not subject to, any debts of each, or either, or all of them, or for any indebtedness, or any claims, demands or causes of action whatsoever, that any person, corporation or company shall or may have, or claim, [16] or may claim to have, or that may be made against them, respectively, or any, or either, or all, or them.

7. Upon the death of all the beneficiaries herein named, to-wit: Maud Gillespie, B. A. Gillespie, L. A. Gillespie, P. A. Gillespie, and F. A. Gillespie, this Trust Estate and Trust shall cease and terminate, and said shares of said Capital Stock, or

the interest then existing in said Trust Estate, or Trust, shall thereupon pass absolutely to the remainder men then living, and herein and hereunder provided for, or, in the event, no such remainder men, specifically mentioned and provided for herein, shall then be living, to the heirs at law entitled thereto free and clear of any trust or restrictions herein provided for.

10. In Witness Whereof, I have hereunto set my hand and seal, this the 9th day of February, A. D., 1921.

[Seal] (Signed) F. A. GILLESPIE [17]

EXHIBIT "C"

AGREEMENT

This Agreement, made and entered into this 15th day of May, 1929, at the City of Los Angeles, in the County of Los Angeles, State of California, by and between F. A. Gillespie, a resident of Oklahoma, as party of the first part hereto and Maud Gillespie, a resident of the City of Los Angeles, State of California, as the party of the second part hereto.

Witnesseth:

That Whereas, the parties hereto intermarried on the 6th day of February, 1892, at Finley, Ohio, and ever since said date have been, and now are, husband and wife; and,

Whereas, the only issue of said marriage are three sons, named Bernard Gillespie, Lester Gillespie and Parmer Gillespie, all of whom are of legal age; and

Whereas, the parties hereto are now and ever since the 15th day of January, 1929 have been living separate and apart; and,

Whereas, the said second party did on the 2nd day of May, 1929, commence action against the said first party in the Superior Court of the State of California, in and for the County of Los Angeles, to secure permanent support and [18] for other relief, and which said action is known and designated upon the records and files of said court as No. D-74622; and,

Whereas, each of the said parties hereto is desirous of determining for both the present and future their respective property rights and their respective financial obligations toward one another;

Now, Therefore, in consideration of the premises and covenants hereinafter set forth, it is hereby mutually agreed as follows, to-wit:

First: In full and complete satisfaction of all financial claims and monetary demands and property claims and property rights of every nature, kind and character whatsoever that the said Maud Gillespie, said second party hereto, as wife, or as widow, or otherwise, has had or now has, or might hereafter have against the said F. A. Gillespie, said first party hereto or against the estate of said F. A. Gillespie, in the event of his death hereafter, as heirs-at-law or otherwise, and in consideration of

all other covenants and agreements in this agreement contained and on the part of the said Maud Gillespie to be kept and performed, the parties hereto do hereby agree each with the other as follows:

[19]

1. The real and personal property now owned by the parties hereto having been acquired since marriage, and therefore, being community property, is hereby transferred each to the other as follows:

The cash funds of the said Maud Gillespie shall be increased to the sum of One Hundred Thousand (\$100,000) Dollars in cash, which shall hereafter be her sole and separate property, and the cash funds of said F. A. Gillespie shall be increased to the sum of One Hundred Thousand (\$100,000) Dollars which shall hereafter be his sole and separate property;

The said F. A. Gillespie reserves to himself, and Maud Gillespie agrees to make any proper or necessary document or bill of sale to convey to the said F. A. Gillespie his personal effects, personal property, his own Paige automobile, and it is distinctly understood and agree that such personal effects and property of the said F. A. Gillespie shall remain in the home at Beverly Hills until such time as he sees fit to take possession of same;

The home place at Beverly Hills, California, shall be properly conveyed to Maud Gillespie, second party hereto, as her sole and separate property and the ranch at Oklahoma shall be properly conveyed to F. A. Gillespie as his sole [20] and separate prop-

erty, and the balance of the property, whether owned jointly or separately, or standing in the name of the parties hereto, or in the names of others, and particularly the securities in Vault No. 2014, Security-First National Bank of Los Angeles, the real estate in Oklahoma, the Gila Water Project, the Red Rover Copper stock, the claim against the Los Angeles Fisheries Company, shall all be properly conveyed to a corporation known as F. A. Gillespie and Sons Company, organized on the 24th day of April, 1920, under and by virtue of the laws of the State of Oklahoma, which company has a capital stock of One Million (\$1,000,000) Dollars, divided into Ten Thousand (10,000) shares of the par value of One Hundred Dollars each, and which corporation has three directors, to-wit; F. A. Gillespie, B. A. Gillespie and P. A. Gillespie, each of whom own five shares of stock of said corporation, and the balance of of Nine Thousand Nine Hundred Eighty-five (9985) shares stands in the name of F. A. Gillespie, as trustee for said members of his family under and pursuant to that certain Declaration of Trust dated February 9, 1921, a copy of which is hereto attached and made a part hereof.

2. In consideration of the conveyance of said property to such corporation, the said parties hereto agree to cause said corporation to pay to each of the parties hereto the sum of Fifteen Thousand (\$15,000) Dollars per year as long [21] as each of them shall live and further, that in addition to said sum of Fifteen Thousand (\$15,000) Dollars, the

said Maud Gillespie shall receive the sum of at least Ten Thousand (\$10,000) Dollars per year by way of dividends, and if for any reason dividends in the amount of Ten Thousand (\$10,000) Dollars per year is not available then in that event said corporation shall pay the said sum of Ten Thousand Dollars (\$10,000) additional to the said Maud Gillespie, it being the purpose and intention of this agreement that the said Maud Gillespie shall receive at least the sum of Twenty-five Thousand (\$25,000) Dollars per year cash from said corporation.

3. Said F. A. Gillespie agrees to cause to be made, executed and delivered contemporaneously herewith, to said Maud Gillespie, a bill of sale transferring to the said Maud Gillespie the household furniture, furnishings, fixtures, rugs, utensils, silverware and all other personal property now located in and being used as a part of said home place in Beverly Hills, California, and also a proper transfer of the title to those certain Marmon and Cadillac automobiles.

4. Both of the parties hereto agree to pay, contemporaneously with the execution of this agreement, to Walter E. Burke, the sum of Nine Thousand (\$9,000.00) Dollars in cash in full settlement of all attorneys fees heretofore [22] incurred or which may be hereafter incurred in the above mentioned action.

Second: All of the property of said Maud Gillespie, both real and personal, now held by her or which shall hereafter be acquired by her in any

manner whatsoever, shall be and remain her sole and separate property, free from any and all rights or claims of the said F. A. Gillespie, with full power to her to sell, convey, transfer, assign, mortgage, pledge, lease or deal with the same as if she were single. And the said F. A. Gillespie will from time to time, but only in such manner as not to create any personal liability on his part, execute any and all such deeds, conveyances, mortgages, pledges, leases and papers as may be necessary or proper to enable her to sell, convey, transfer, assign, mortgage, pledge, lease or deal with her said property as she chooses. And the said F. A. Gillespie does hereby waive and surrender any and all right, in the event of death of said Maud Gillespie, to act as the administrator of her estate, or to inherit any of her property as husband, or otherwise, and said F. A. Gillespie does hereby agree to never hereafter make any claim upon or against said Maud Gillespie or upon or against any of the property of said Maud Gillespie, either as surviving husband, or otherwise, or upon or against her estate, and said Maud Gil-

[23]

lespie shall have the uncontested right and privilege to dispose of any and all of her property by will, deed or otherwise as she sees fit, and on her death, in the lifetime of said F. A. Gillespie, all her separate estate, and all of her estate, both real and personal, which she shall not have disposed of in her lifetime or by will, shall, subject to her debts and engagements, go and belong to the person or persons who would have become entitled thereto if

the said F. A. Gillespie had died in the lifetime of said Maud Gillespie; and if the said F. A. Gillespie, he shall, without contest of any kind, permit her will to be proved, or administration upon her estate to be taken out by the person or persons who would have been entitled to do so had he, the said F. A. Gillespie, died in her lifetime.

Third: All of the property of the said F. A. Gillespie, both real and personal, except such as in this agreement is given or provided to be given to the said Maud Gillespie, and now held by him, or which shall hereafter be acquired by him in any manner whatsoever, shall be and remain his sole and separate property, free from any and all rights, and claims, except only as herein provided, of the said Maud Gillespie, with full power to him to sell, convey, transfer, assign, mortgage, pledge, lease or deal with the [24] same as if he were single. And the said Maud Gillespie will, from time to time (but only in such manner as not to create any personal liability on her part), execute any and all such deeds, conveyances, mortgages, pledges, leases and papers as may be necessary or proper to enable him to so sell, convey, transfer, assign, mortgage, pledge, lease or deal with his said property as he chooses. And the said Maud Gillespie, contemporaneously with the execution herewith, hereby agrees to properly execute and deliver to said F. A. Gillespie quit claim deeds to all of the property belonging to him and not hereinbefore given or granted to said Maud Gillespie.

And the said Maud Gillespie does hereby waive and surrender any and all right, in the event of the death of said F. A. Gillespie, to act as the administratrix of his estate, or to inherit any of his property as wife or otherwise, and said Maud Gillespie does hereby agree to never hereafter make any claim for support or maintenance or alimony, counsel fees or costs in any action for divorce or separate maintenance or otherwise or at all, upon or against said F. A. Gillespie or upon or against any of the property of said F. A. Gillespie, either as surviving wife or otherwise, or upon or against his estate, except as to and for said income, dividends and profits arising out of or payable from said trust estate or as in this agreement hereinbefore [25] provided, and said F. A. Gillespie shall have the uncontested right and privilege to dispose of any and all of his property as to said income, dividends and profits arising out of said trust estate as hereinbefore mentioned, by will, deed or otherwise, as he sees fit, and if the said F. A. Gillespie shall die in the lifetime of the said Maud Gillespie, she shall, without contest of any kind, permit his will to be proved, or administration upon his estate to be taken out by the person or persons designated in such will as the executors thereof, or by the person or persons who would have been entitled to do so had she, the said Maud Gillespie died in his lifetime.

Fourth: Said Maud Gillespie does hereby covenant, promise and agree never hereafter to charge or cause or permit to be charged to said F. A.

Gillespie any purchase which she may hereafter make, and never hereafter to secure any credit upon or in connection with said F. A. Gillespie or his name, and that she personally will promptly pay all debts and discharge all financial obligations hereafter incurred by her and that she will ever hereafter hold said F. A. Gillespie free and harmless from any and all debts and other obligations which may have been incurred or may hereafter be incurred by her, except as herein otherwise specifically provided. [26]

Fifth: Said first party does hereby agree with said second party that he will not at any time file any declaration of homestead against any property belonging to the second party and he does hereby relinquish and release all of his rights under any homestead law whatsoever in and to any property which second party now has or may hereafter acquire, and said second party does hereby agree with first party that she will not at any time file any declaration of homestead against any property belonging to first party and she does hereby relinquish and release all other rights under any homestead law whatsoever in and to any property which first party now has or may hereafter acquire.

Sixth: It is hereby agreed and understood that this agreement is intended as a full and complete settlement of all property rights and claims of every kind and character, nature or description whatsoever of each of the parties hereto against the other, either now existing or which may arise in the future,

and this agreement is not intended, and is not to be construed, as an agreement for, or contemplating, a divorce between the parties hereto or as a waiver of any cause of action for divorce or of any defense for an action for divorce which either party may have. [27]

Seventh: The parties hereto further agree to make, execute and deliver any necessary documents to carry out the purposes of this agreement.

Eighth: This agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators and assigns of the respective parties hereto.

In Witness Whereof, the said parties here hereunto set their hands and seals, the day and year first above written.

[Seal]

F. A. GILLESPIE

[Seal]

MAUD GILLESPIE [28]

State of California,
County of Los Angeles—ss.

On this 23rd day of May, in the year nineteen hundred and twenty-nine, A. D. before me, Walter E. Burke, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared F. A. Gillespie and Maud Gillespie, personally known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my

hand and affixed my official seal the day and year in this certificate first above written.

[Seal] WALTER E. BURKE,
Notary Public in and for the County of Los Angeles,
State of California. [29]

EXHIBIT "D"

AGREEMENT

This Agreement, made and entered into this 15th day of May, 1929, by and between F. A. Gillespie, hereinafter for convenience called the "Husband", Maud Gillespie, hereinafter for convenience called the "Wife", and F. A. Gillespie and Sons Company, a corporation organized and existing under the laws of the State of Oklahoma, hereinafter for convenience called the "Corporation."

Witnesseth:

Whereas, the Husband and Wife, did, on the 15th day of May, 1929, make, execute and deliver a certain agreement by the terms of which they determined for all time their respective property interests, a copy of which agreement is attached hereto and made a part of this agreement, and,

Whereas, by the terms of said agreement the Husband and Wife have agreed to properly convey to the Corporation, real and personal property of the value of at least Three Million (\$3,000,000) Dollars, and,

Whereas, as part consideration for the transfer to said Corporation of said securities, the Corporation has agreed to pay to the Husband and Wife, each respectively, the sum of Fifteen Thousand (\$15,000) Dollars per year, and [30] in addition thereto, the Corporation guarantees to the said Wife that as long as she shall live she shall receive dividends in an amount of at least Ten Thousand (\$10,000) Dollars per year, and if for any reason funds are not available to be declared as dividends, then said Corporation shall cause to be paid to the said Wife the sum of Ten Thousand (\$10,000) Dollars per year. It being the purpose and intention of this agreement that the Corporation pay to Maud Gillespie herein called the Wife, the sum of at least Twenty-five Thousand (\$25,000) Dollars per year in the manner indicated in this paragraph, and,

Whereas, the beneficial interest in and to all of the stock of the Corporation is owned as set forth in that certain Declaration of Trust dated February 9, 1921, and signed by F. A. Gillespie as Trustee, a copy of which is hereto attached, and referred to for further particulars.

Now, Therefore, for and in consideration of the faithful performance of the terms and conditions of this agreement it is agreed as follows:

1. The Husband and Wife do hereby sell, set over and assign, deed and convey, and agree to properly transfer to the Corporation all of the real and personal property now standing in their names, or now held or owned jointly, severally, or as commu-

nity property by them or either of them, [31] excepting only to the Wife, the home at Beverly Hills, California, the house furnishings, personal property and the sum of One Hundred Thousand (\$100,000) Dollars and to the Husband the ranch near Tishomingo, Oklahoma, known as the Herford Springs Ranch, and the sum of One Hundred Thousand (\$100,000) Dollars. In consideration thereof, the Corporation agrees to pay to the Husband and Wife each, respectively, the sum of Fifteen Thousand (\$15,000) Dollars per year as long as they respectively live, and in addition thereto to pay to the said wife, dividends in at least the sum of Ten Thousand (\$10,000) Dollars per year, and if for any reason funds are not available to be paid as dividends in the manner herein indicated, then in that event the Corporation agrees to pay to the said Maud Gillespie herein called the Wife, the sum of Ten Thousand Dollars (\$10,000) per year, it being the purpose and intention of this agreement that the Corporation pay to the said Maud Gillespie in cash at least the sum of Twenty-five Thousand (\$25,000) Dollars per year hereafter. This in no way affects any salaries paid by the Corporation.

2. The Husband agrees with the wife and with the Corporation that he, the said F. A. Gillespie, will not sell or transfer any of the corporate stock of the corporation now standing of record in the records of the Corporation [32] in accordance with the terms of the Declaration of Trust dated February 9, 1921, hereinafter referred to, without the

written consent so to do of a majority of the Board of Directors of the Corporation.

4. In transferring to the Corporation and the securities now in Box No. 2014 in the Security-First National Bank of Los Angeles, it is definitely understood and agreed that the dividends or interest or coupons due to June 15, 1929, shall be paid and delivered to the said F. A. Gillespie.

5. It is further distinctly understood and agreed that each and all of the parties hereto agree to make and execute all necessary documents to complete the term and conditions of this agreement.

In Witness Whereof, the Corporation, F. A. Gillespie and Sons, has caused its corporation name to be hereunto signed by its duly authorized president and its seal to be hereunto affixed by its secretary, and the said F. A. Gillespie and Maud Gillespie have affixed their signatures hereto in the day and year first above written.

[Corporate Seal]

F. A. GILLESPIE AND SONS
COMPANY

F. A. GILLESPIE
President

Attest:

B. A. GILLESPIE,
Secretary

F. A. GILLESPIE
MAUD GILLESPIE [33]

State of California,
County of Los Angeles—ss.

On this 23rd day of May, in the year nineteen hundred and twenty-nine, A. D. before me, Walter E. Burke, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared F. A. Gillespie and Maud Gillespie personally known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] WALTER E. BURKE,
Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

On this 23rd day of May, in the year nineteen hundred and twenty-nine, A. D. before me Walter E. Burke, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and qualified, personally appeared F. A. Gillespie, known [34] to me to be the President and B. A. Gillespie, known to me to be the Secretary of the F. A. Gillespie and Sons Company, the corporation that executed the within and foregoing instrument, on behalf of the corpo-

ration therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said County, the day and year in this certificate first above written.

[Seal]

WALTER E. BURKE,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: U. S. B. T. A. Filed May 25, 1939.

[35]

[Title of Board and Cause.]

ANSWER

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits that the taxes in controversy are income taxes for the calendar year 1935. Denies the remainder of the allegations contained in paragraph 3 of the petition.
4. (a) and (b) Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. (a) and (b) Denies the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition. [36]

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the petition be denied and that the respondent's determination be in all respects approved.

Signed J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,
FRANK T. HORNER,
E. A. TONJES,
Special Attorneys,
Bureau of Internal Revenue.

EAT/W 6/24/39

[Endorsed]: U. S. B. T. A. Filed July 5, 1939.
[37]

[Title of Board and Cause.]

AMENDED PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of

deficiency, IT:R:E:2, OMS-90D, dated March 2, 1939, and as a basis of her proceeding, alleges as follows:

1. The address of the petitioner is 712 North Roxbury Drive, Beverly Hills, California.

2. The notice of deficiency, a copy of which is hereto attached, marked Exhibit "A", was mailed to the petitioner on March 2, 1939, by registered mail.

3. The tax in controversy is income tax for the calendar year 1935. The deficiency asserted in the ninety-day letter is \$1,476.55, which is the amount in controversy. [38]

4. The determination of the tax as set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in including in taxpayer's gross income the sum of \$17,666.25 received from F. A. Gillespie & Sons Company during the year 1935.

(b) The Commissioner of Internal Revenue erred in considering as annuity income the sum of \$17,666.25 received from F. A. Gillespie & Sons Company during the year 1935.

(c) In the alternative, if the Honorable Board determines that any part of the sum of \$17,666.25 received by Maud Gillespie from F. A. Gillespie & Sons Company during the year 1935 is taxable, then only such portion of \$17,666.25 is taxable as represents 3% of what an annuity would have cost

at May 15, 1929 as would have produced the sum of \$15,000 per annum during the lifetime of Maud Gillespie.

5. The facts upon which the petitioner relies in support of the foregoing assignments of error, and as a basis of this proceeding, are as follows:

(a) On the 9th day of February, 1921, a certain trust agreement was entered into by which F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie entered into a certain Declaration of [39] Trust. A true copy of said Declaration of Trust is attached to the original Petition filed in this case, marked Exhibit "B", and by reference thereto is made a part of this Amended Petition.

On the 15th day of May, 1929, F. A. Gillespie and Maud Gillespie entered into a certain agreement, a copy of which is attached to the original Petition filed in this case, marked Exhibit "C", and by reference thereto is made a part of this Amended Petition.

On the 15th day of May, 1929, a certain agreement was entered into between F. A. Gillespie, Maud Gillespie and F. A. Gillespie & Sons Company, a copy of which agreement is attached to the original Petition filed in this case, marked Exhibit "D", and by reference is incorporated and made a part of this Amended Petition.

Pursuant to the terms of the foregoing agreement, F. A. Gillespie & Sons Company paid over

to Maud Gillespie during the year 1935 the sum of \$17,666.25. Section 22 (a) (2) of the Revenue Act of 1934 is unconstitutional and not within the purview of the Sixteenth Amendment to the Constitution of the United States. The manner in which the Commissioner of Internal Revenue has sought to tax this taxpayer constitutes the taking of the taxpayer's property without compensation and constitutes an unconstitutional act upon the part of the Commissioner of Internal Revenue. [40]

(b) On the 9th day of February, 1921, a certain Trust Agreement was entered into by which F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie entered into a certain Declaration of Trust. A true copy of said Declaration of Trust is attached to the original Petition filed in this case, and marked Exhibit "B", and by reference thereto is made a part of this Amended Petition.

On the 15th day of May, 1929, F. A. Gillespie and Maud Gillespie entered into a certain agreement, a copy of which agreement is attached to the original Petition filed in this case and marked Exhibit "C", and by reference thereto is incorporated and made a part of this Amended Petition.

On the 15th day of May, 1929, a certain agreement was entered into between F. A. Gillespie, Maud Gillespie and F. A. Gillespie & Sons Company, a copy of which agreement is attached to the original Petition filed in this case, and marked Ex-

hibit "D", and by reference thereto is incorporated and made a part of this Amended Petition.

Pursuant to the terms of the foregoing agreement, F. A. Gillespie and Maud Gillespie transferred to F. A. Gillespie & Sons Company property having a cash cost value to them materially in excess of One Million Dollars (\$1,000,000). In accordance with the terms of the foregoing agreement and [41] in consideration of the transfer of the property before mentioned, F. A. Gillespie & Sons Company paid over to Maud Gillespie during the taxable year 1935 the sum of \$17,666.25. Prior to the year 1935, Maud Gillespie had received the sum of \$79,894.01, in consideration of the said transfer of property. Prior to the year 1935, F. A. Gillespie had received the sum of \$84,375.00 in consideration of the said transfer of property.

(c) Pursuant to the terms of the foregoing agreements set out as Exhibits "B", "C" and "D" of the original Petition filed in this case and incorporated herein by reference and made a part of this Amended Petition, F. A. Gillespie and Maud Gillespie delivered to F. A. Gillespie & Sons Company property having a value materially in excess of the cost of purchasing an annuity upon the life of F. A. Gillespie which would pay him the sum of \$15,000 per year, and an annuity upon the life of Maud Gillespie which would pay her a sum of \$15,000 per year, or \$20,000 per year, or \$25,000 per year, for life.

F. A. or Frank A. Gillespie was born in Venango City, Pennsylvania on April 22, 1868. An Annuity could have been purchased on May 15, 1929, upon the life of a male individual born on April 22, 1868, which would have paid the sum of \$15,000 per annum to said male individual for life for the sum of \$153,750. [42]

Maud Gillespie, nee Maud McCoy, was born in Oil City, Pennsylvania on June 9, 1872. An annuity could have been purchased on May 15, 1929, upon the life of a female individual born on June 9, 1872, which would have paid \$15,000 to said female individual for life for the sum of \$196,537.50. An annuity could have been purchased on May 15, 1929, upon the life of a female individual born June 9, 1872, which would have paid \$20,000 per annum to said female individual for life for the sum of \$262,550. An annuity could have been purchased on May 15, 1929, upon the life of a female individual born on June 9, 1872, which would have paid \$25,000 per annum to said female individual for life for the sum of \$327,562.50.

Wherefore, Petitioner prays that the Board may hear this proceeding and determine that there is no deficiency.

(Signed) HAROLD E. RORSCHACH

529 McBirney Building,
Tulsa, Oklahoma.

Counsel for Petitioner [43]

State of California

County of Los Angeles—ss.

Maud Gillespie, being duly sworn says that she is the taxpayer in the foregoing petition and that she has read said petition and is familiar with the statements therein contained and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts she believes to be true.

(Signed) MAUD GILLESPIE

Subscribed and sworn to before me this 28th day of November, 1939.

[Seal] (Signed) HELEN GILBERT

Notary Public

My commission expires: January 20, 1943.

[For Ex. "A" see Ex. "A" Attached to Petition.]

[Endorsed]: U. S. B. T. A. Filed Dec. 5, 1939.

[44]

[Title of Board and Cause.]

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits the allegations contained in paragraph 3 of the amended petition.

4. Denies that the Commissioner committed the errors alleged in subparagraph (a), (b) and (c) of paragraph 4 of the amended petition.

5(a). Admits the allegations set forth in the first three paragraphs of paragraph 5(a). Admits the allegations set forth in the first three lines of the fourth paragraph of paragraph 5(a). Denies the remaining allegations set forth in the fourth paragraph of paragraph 5(a) of the amended petition.

[45]

5(b). Admits the allegations contained in subparagraph (b) of paragraph 5 of the amended petition except that it is denied that prior to the year 1935 Maud Gillespie had received the sum of \$79,-894.01 in consideration of said transfer of property and that prior to the year 1935 F. A. Gillespie had received \$84,375.00 in consideration of said transfer of property.

5(c). Denies the allegations contained in subparagraph (c) of paragraph 5 of the amended petition.

6. Denies generally and specifically each and every allegation contained in the amended petition not heretofore admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL

JEM

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

JAMES L. BACKSTROM,

Division Counsel,

STANLEY B. ANDERSON,

Special Attorney,

Bureau of Internal Revenue.

JEM/meg 12/28/39

[Endorsed]: U. S. B. T. A. Filed Jan. 3, 1940.

[Title of Board and Cause.]

AMENDMENT TO AMENDED PETITION

Petitioner desires to amend her amended petition by striking therefrom paragraphs 5(a) and 5(b) and in lieu thereof, substituting the following:

5. The facts upon which the petitioner relies in support of the foregoing assignments of error, and as a basis of this proceeding, are as follows:

(a) On the 9th day of February, 1921, a certain trust agreement was entered into by which F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie entered into a certain Declaration of Trust. A true copy of said Declara-

tion of Trust is attached to the original Petition filed in this case, marked Exhibit "B", and by reference thereto is made a part of this Amended Petition.

On the 15th day of May, 1929, F. A. Gillespie and Maud Gillespie entered into a certain agreement, a copy [46] of which is attached to the original Petition filed in this case, marked Exhibit "C", and by reference thereto is made a part of this Amended Petition.

On the 15th day of May, 1929, a certain agreement was entered into between F. A. Gillespie, Maud Gillespie and F. A. Gillespie and Sons Company, a copy of which agreement is attached to the original Petition filed in this case, marked Exhibit "D", and by reference is incorporated and made a part of this amended petition.

Pursuant to the terms of the foregoing agreement, F. A. Gillespie & Sons Company paid over to Maud Gillespie during the year 1935 the sum of \$15,000.00. Section 22 (a) (2) of the Revenue Act of 1934 is unconstitutional and not within the purview of the Sixteenth Amendment to the Constitution of the United States. The manner in which the Commissioner of Internal Revenue has sought to tax this taxpayer constitutes the taking of the taxpayer's property without compensation and constitutes an unconstitutional act upon the part of the Commissioner of Internal Revenue.

(b) On the 9th day of February, 1921, a certain Trust Agreement was entered into by which F. A.

Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie and P. A. Gillespie entered into a certain Declaration of Trust. A true copy of said Declaration of Trust is attached to the [47] original Petition filed in this case, and marked Exhibit "B", and by reference thereto is made a part of this Amended petition.

On the 15th day of May, 1929, F. A. Gillespie and Maud Gillespie entered into a certain agreement, a copy of which agreement is attached to the original Petition filed in this case and marked Exhibit "C", and by reference thereto is incorporated and made a part of this Amended Petition.

On the 15th day of May, 1929, a certain agreement was entered into between F. A. Gillespie, Maud Gillespie and F. A. Gillespie & Sons Company, a copy of which agreement is attached to the original Petition filed in this case, and marked Exhibit "D", and by reference thereto is incorporated and made a part of this Amended Petition.

Pursuant to the terms of the foregoing agreement, F. A. Gillespie and Maud Gillespie transferred to F. A. Gillespie & Sons Company property having a cash cost value to them materially in excess of One Million Dollars (\$1,000,000.00). In accordance with the terms of the foregoing agreement and in consideration of the transfer of the property before mentioned, F. A. Gillespie & Sons Company paid over to Maud Gillespie during the taxable year 1935 the sum of \$15,000.00. Prior to the year 1935, Maud Gillespie had received the sum of \$79,894.01

in consideration of the said transfer of property. Prior to the year 1935, F. A. Gillespie [48] had received the sum of \$84,375.00 in consideration of the said transfer of property.

MAUD GILLESPIE

By: (Signed) HAROLD E. RORSCHACH

(Signed) HAROLD E. RORSCHACH

529 McBirney Building,

Tulsa, Oklahoma.

Counsel for Petitioner

State of Oklahoma

County of Tulsa—ss.

Harold E. Rorschach, being duly sworn, says that he is counsel for the petitioner above named and that he has read the amendment to said petition and is familiar with the statements therein contained and that the facts stated therein are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

(Signed) HAROLD E. RORSCHACH

Subscribed and sworn to before me this 15th day of May, 1940.

[Seal]

(Signed) IRMA ALLEN

Notary Public

My Commission expires March 30, 1944.

[Endorsed]: U. S. B. T. A. Filed at Hearing May 16, 1940. [49]

[Title of Board and Cause.]

ANSWER TO AMENDMENT TO AMENDED
PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to amended petition filed by the above-named taxpayer, admits and denies as follows:

5(a) Admits the allegations set forth in the first three subparagraphs of paragraph 5(a). Denies the allegations set forth in the fourth and last subparagraph of paragraph 5(a).

5(b). Admits the allegations contained in subparagraphs (b) of paragraph 5(b), except that it is denied (1) that F. A. Gillespie and Sons Company paid over to Maud Gillespie during the year 1935 the sum of \$15,000.00 (2) that prior to the year 1935 Maud Gillespie had received the sum of \$79,894.01 in consideration of said transfer of property, and (3) that prior to 1935 F. A. Gillespie had received the sum of \$84,375.00 in consideration of the said transfer of property. [50]

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the amendment to amended petition be denied.

(Signed) J. P. WENCHEL

JEM

Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

JAMES L. BACKSTROM,

Division Counsel.

STANLEY B. ANDERSON,

Special Attorney,

Bureau of Internal Revenue.

SBA/meg 6/24/40

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[51]

REPORTER'S TRANSCRIPT

DEPOSITIONS OF CHARLES D. GREEN

and MAUD GILLESPIE,

taken on behalf of the Petitioner.

Beverly Hills, California Saturday, April 27, 1940.

APPEARANCES:

For the Petitioner: Harold E. Rorschach, Esq.

For the Respondent: Samuel Taylor, Esq.

Reported By: C. N. Olson.

C. N. Olson

Shorthand Reporter—Deposition Notary

817 H. W. Hellman Building

354 South Spring Street

Los Angeles, California

Mutual 2248 [52]

[Title of Board and Cause.]

ORDER

On motion of counsel for the petitioner, it is

Ordered, that the Order to Take Depositions issued in the above-entitled proceeding March 27, 1940 be and the same is hereby amended to provide for the taking of the deposition of Maud Gillespie on April 27, 1940 instead of April 26, 1940.

In all other respects the Order to Take Depositions issued March 27, 1940 shall remain unchanged.

[Seal]

(Signed) C. R. ARUNDELL

Member.

Dated: Washington, D. C., April 15, 1940.

cgh [53]

To the United States Board of Tax Appeals:

I, C. N. Olson, the person named in the foregoing order to take depositions, hereby certify:

1. That I proceeded, on the 27th day of April, A. D., 1940, at the residence of Maud Gillespie, 712 North Roxbury Drive, in the City of Beverly Hills, State of California, at 10:00 o'clock, A. M., under the said order and in the presence of Harold E. Rorschach, Esq. and Samuel Taylor, Esq., the counsel of the respective parties, to take the following depositions, viz:

Charles D. Green, a witness produced on behalf of the Petitioner;

Maud Gillespie, a witness produced on behalf of the Petitioner.

2. That each witness was examined under oath at such times and places as conditions of adjournment required, and that the testimony of each witness was taken stenographically and reduced to typewriting by me or under my direction.

3. That after the testimony of each witness had been reduced to writing the transcript of that testimony was read and signed by the witness in my presence, and that each witness acknowledged before me that his testimony was in all respects truly and correctly transcribed.

4. That, after the signing of the deposition in my presence, no alterations or changes were made therein.

5. That I have no office connection or business employment with the Petitioner or his attorney.

[Seal] (Signed) C. N. OLSON

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires December 23, 1941.
817 H. W. Hellman Building,
354 South Spring Street,
Los Angeles, California. [54]

[Title of Board and Cause.]

Be It Remembered that pursuant to Orders to Take Depositions and Amended Order and Stipulation, all hereunto annexed, and on the 27th day of April, 1940, at 10:00 o'clock, A. M., at 712 North

Roxbury Drive, Beverly Hills, Los Angeles County, State of California, before me, C. N. Olson, a notary public in and for said Los Angeles County, State of California, duly commissioned to administer oaths, personally appeared Charles D. Green and Maud Gillespie, called as witnesses on behalf of the Petitioner in the above-entitled action now pending before said Board, who, being by me first duly sworn, testified as follows:

Appearances:

For the Petitioner: HAROLD E. RORSCHACH, Esq.

For Respondent: SAMUEL TAYLOR, Esq. [55]

CHARLES D. GREEN,

called as a witness in behalf of the Petitioner, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Rorschach:

Q. Mr. Green, will you state your name?

A. Charles D. Green.

Q. How long have you lived in the vicinity of Santa Monica, Long Beach and Los Angeles?

A. Since 1909.

Q. What business were you engaged in from about 1926 to 1929?

(Deposition of Charles D. Green.)

A. I was engaged in the real estate business.

Q. And were you also engaged——

A. And building.

Q. In contracting and building? A. Yes.

Q. Were you familiar with and dealing with real property in the City of Santa Monica during that period?

A. No. I was familiar with it but I didn't deal in any property in Santa Monica during that time.

Q. But you were familiar with property in that general area?

A. I was familiar with property values.

Q. About May of 1929 were you familiar with Lots V, W, and X in Block 148 in the City of Santa Monica? A. Yes.

Q. Do you have an opinion as to the value of those three lots located [57] in the City of Santa Monica as of May 15, 1929?

A. I have an opinion.

Mr. Taylor: What is the materiality of that question, Mr. Rorschach?

Mr. Rorschach: To show the value of these lots which Mrs. Gillespie turned in and sold to the Corporation on May 15, 1929.

Mr. Taylor: Would you enter my objection on the ground of immateriality. [Overruled. Exception. S. B. H.]

Mr. Rorschach: Q. Do you have an opinion of the value of those three lots as of May 15, 1929?

A. Yes I have.

(Deposition of Charles D. Green.)

Mr. Taylor: Will it be stipulated that I object to each of these questions in regard to the opinion on the ground of immateriality? [Overruled. Exception. S. B. H.]

Mr. Rorschach: Yes.

Mr. Taylor: Then I won't make a separate objection.

Mr. Rorschach: That may be noted in the record it is agreed you object to the materiality of this line of questioning.

Q. What is your opinion with respect to that value?

A. My opinion is it was worth about \$800 a front foot, around \$120,000 for the property.

Q. Will you briefly state to the Board the location of these lots with respect to the City of Santa Monica and the ocean front?

A. Well, I consider them the best-located lots in Southern California for beach property.

Q. Well, where are they located?

A. They are on the ocean front with a perpetually-deeded park in front of them, one block south of Wilshire Avenue and one block north of Santa Monica Boulevard, two of the most prominent arteries in Southern California.

Q. On what street do they front?

A. They front on Ocean Avenue.

Q. Will you describe briefly where Ocean Avenue is located? [58]

A. Ocean Avenue runs,—it is the street nearest the ocean on top of the bluff in Santa Monica.

(Deposition of Charles D. Green.)

Q. Is it on what might be termed a beach or ocean highway?

A. Yes. It is also partially on 101 going north.

Q. Now you stated those lots are located facing on Ocean Avenue? A. Yes.

Q. Will you state if they are corner lots, and what other streets, if any, they face on?

A. Yes, they are corner lots and face on Arizona also.

Mr. Rorschach: That is all, Mr. Green. Do you have any questions to ask, Mr. Taylor?

Mr. Taylor: Yes.

Cross Examination

By Mr. Taylor:

Q. Will you repeat, Mr. Green, where these lots are?

A. These lots are on the corner of Ocean Avenue and Arizona Avenue in Santa Monica.

Q. They do not front right on the ocean?

A. They front right on the—are you familiar with that district?

Q. Yes, I am familiar with that area. Are they on top of the bluff?

A. Yes, they are on top, yes.

Q. Then they are not on the ocean as the beach clubs are? A. No, they are on top of the bluff.

Q. And in order to get to the ocean from them you have to go down the highway to the bottom?

A. Yes, that is right.

(Deposition of Charles D. Green.)

Q. They do not front on the ocean as, for example, Marian Davies' place? [59]

A. No. They front on the bluff.

Q. They front on the avenue on top of the bluff?

A. Yes.

Q. Then you go down to the highway that is on the level with the ocean, practically?

A. That is right.

Q. And then there are further lots which actually front on the ocean? A. That is right.

Q. But these lots are not in that second category? A. No.

Q. What is on these lots?

A. At the moment?

Q. What was on these lots, Mr. Green, as of May 15, 1929, the date of these transfers?

A. There was one old two-story residence and a little Indian store, just a little office building, just a little bit of a frame building.

Q. You state the value as \$800 a front foot?

A. That is correct, yes.

Q. That is based solely on the value of the land?

A. Solely on the value of the lots.

Q. What is next to these lots? Are they near the Miramar Hotel?

A. They are a block from the Miramar Hotel.

Q. What was next to these lots at the time of this transfer? A. Another old residence.

Q. Well, the value that you give then is more or less a potential value, isn't it, considering their possible use? A. Absolutely.

(Deposition of Charles D. Green.)

Q. It is not the actual value? [60]

A. Not the actual. It was the valuation that was generally considered on ocean lots as potential value, correct.

Q. Can you go into further detail, Mr. Green, as to the basis of your opinion? You state that you have never dealt in real estate. Now, how do you know or on what basis did you reach your figure?

A. Did I reach that belief? I reached it the same way, if I might explain this, that I base the present valuation. At that time we checked those lots as to——

Q. When you say “we” whom do you mean?

A. I was here on and off with Mr. Gillespie, another Mr. Gillespie, Mr. Parmer Gillespie, who I have been friends with for a number of years. I was in no way associated with him in business. But we checked those lots and a number of others for potential possibilities and that was the basis considered among real estate men that we questioned at that time, just as the present basis among real estate men at the present time on ocean frontage, potential possibilities with no buildings on them of any worth are placed at \$350 a front foot for inside lots and \$400 a front foot for others, and that is the basis for appraisals by the Los Angeles Realty Board appraisers.

Q. You base this opinion on discussions then with real estate men?

A. And what property was moving at, yes, that is right.

(Deposition of Charles D. Green.)

Q. Is your opinion based on your own knowledge or what these men told you?

A. I think opinions are always based more or less on information one can obtain.

Q. Prior to the time that you formed your opinion as to the value of these lots were you in the real estate business here in California or did you come here from another State, or what was the situation?

A. No, I was here in California in 1929.

Q. How long had you been in California at that time? A. Since 1901. [61]

Q. Since 1901? A. Yes, 1901.

Q. Were there any sales at the time of comparable lots, Mr. Green, that you were familiar with?

A. I couldn't definitely say there were of comparable lots, but at the time we were looking at this property properties were moving at around this price. If you are looking for a definite lot—we were looking at a number of them but I could not state a definite lot.

Q. You do not take into consideration then sales of comparable lots in the vicinity?

A. I would say at that time we did. If you ask me the specific lot, I could not give you that, but I do recall we were looking at several different lots down there, some of which—in fact, this property was moving quite rapidly at that particular time. All real estate in that vicinity was changing hands very rapidly.

(Deposition of Charles D. Green.)

Q. But your main reliance was upon the opinion of real estate men with whom you spoke?

A. Yes it was, with the addition that I can add that some of the real estate men that I spoke with were willing to substantiate their opinion with some considerable investment to go in with it.

Q. What was your business at the time, Mr. Green?

A. What business was I in at that time?

Q. Yes. A. In 1929?

Q. At the time that you valued these lots?

A. I was working in a real estate business with my father who at that time was located in Fresno—in Madera specifically, in the San Joaquin Valley.

Q. You were in the real estate business there?

[62]

A. Yes, I was working with him, actually more building and selling than in the actual real estate business. Father never did any so-called general real estate business. He did so-called speculative real estate business.

Q. Madera is about 350 miles from Santa Monica?

A. Yes Sir. However, I had been living in Long Beach. I was raised in Long Beach.

Q. Long Beach is about twenty miles from Santa Monica, is it? A. That is right.

Q. How long had you been living in Madera?

A. I think only about a year.

Q. And prior to that time?

A. I had been living in Long Beach.

(Deposition of Charles D. Green.)

Mr. Taylor: I object to Mr. Green's testimony, and also move to strike his testimony on the ground that it is hearsay, and upon the further ground that no proper foundation has been laid, and upon the ground that it is immaterial. That is all I have. [Sustained on ground of hearsay, and lack of qualification to testify as to value. Exception allowed. S. B. H.]

Redirect Examination

By Mr. Rorschach:

Q. Now, Mr. Green, with respect to the location of these lots to which you have testified, did I understand you to say that they faced the ocean and that across the street there is a perpetually-deeded park? A. A small parkway, yes.

Q. Well, the location of these lots, are they on a level with these beach homes, or is this location of the park and Ocean Avenue at this particular point located in some other way?

A. I will ask you to state that again. [63]
(The reporter read the pending question).

A. Yes, it is located about seventy feet above the beach.

Q. Then is the view from these lots affected in any way by the location or by the fact that they may be separated by the beach homes below the Palisades at that point?

A. No. They have a very excellent view of the ocean.

(Deposition of Charles D. Green.)

Q. Would you say that they have a better view or not than if they were located on the beach?

A. I would say they have a better view than if they were located on the beach. I would also say they are considerably safer property, due to continuous changing of our California beaches.

Mr. Rorschach: I think that is all.

Recross Examination

By Mr. Taylor:

Q. Mr. Green, I want to get into the record a description of the exact contour of the property there. Now, looking from the ocean inward——

A. Yes.

Q. First of all of course we have the ocean.

A. Yes.

Q. Then you have the beach.

A. That is right.

Q. Now right on that beach you have beach homes and beach clubs and other structures of that sort that face on one side on the ocean and then on the other side they face on the highway. I believe it is Highway 101?

A. That is right.

Q. Then you have this highway. Then on the other side of the highway you have a rather steep Palisades?

A. That is right. [64]

Q. I think Palisades is the proper name?

A. That is right.

Q. Now, except in a few places you cannot get up the Palisades. Now there is one place where there is an auto road up the Palisades?

(Deposition of Charles D. Green.)

A. Yes.

Q. Approximately at the location of these lots or within a few blocks either way?

A. From the road that comes up?

Q. Yes. A. Yes.

Q. Now you go up this auto road and then this auto road leads into a further street that is on top of the Palisades? A. Yes.

Q. Now, between this street and the ocean there is a City park? A. That is right.

Q. That you referred to?

A. Yes, that is right.

Q. Or Mr. Rorschach referred to as the perpetually-deeded park? A. Yes.

Q. Now, on the street there are street-car tracks?

A. That is right.

Q. It is an ordinary city street with automobile and bus traffic? A. Yes.

Q. It is rather a wide street? A. Yes.

Q. Then on the other side of this street away from the ocean and toward Los Angeles there is property, homes and hotels and stores and other property. Now, the lots that you refer to are on the other side of this street? [65]

A. That is right.

Q. Is that correct? A. That is right.

Q. These lots then are approximately 500 feet away from the high-water mark, are they not, and when I say these lots I mean the front of these lots?

A. Yes.

(Deposition of Charles D. Green.)

Q. The part of the lots that is nearest to the ocean? A. Yes, that is right.

Q. In this park from place to place there are various small buildings that the City of Santa Monica has erected, are there not?

A. I believe there are, several blocks from us, yes.

Q. Do you know whether as of the date there in 1929 when this transfer was made whether or not there were any buildings in front of these lots? Do you recall? A. I don't recall any, no.

Q. It is possible there were such, however?

A. Oh it is possible.

Q. As I recall, there were buildings scattered through there? A. Yes.

Q. Now, it is impossible from these lots to see the beach itself, isn't it?

A. No. Oh, what do you mean, standing down on the lot itself?

Q. Yes, I mean from the lot. How could you possibly see the beach? You could not because you have probably 200 feet of——

A. No, I would say you could not. That is right. No, you could not.

Q. You can perhaps see from the lots a distant view of the ocean? A. That is right.

Q. But not of the beach?

A. No. That is correct. [66]

Mr. Taylor: That will be all.

(Deposition of Charles D. Green.)

Redirect Examination

By Mr. Rorschach:

Q. Will you state, Mr. Green, with respect to these lots the location with respect to the Santa Monica Municipal Pier and Yacht Basin?

A. They are located two blocks, approximately two blocks from the Santa Monica Pier which leads to the Yacht Basin.

Q. And they are located on the high Palisades which overlooks the Pier and Yacht Basin and the ocean at that point? A. That is right.

Mr. Rorschach: I think that is all.

The Witness: I would like to suggest my opinion is also enhanced by the fact we get away from considerable dampness which I think is against beach property, that is right down where they get the mist that comes off of the breakers. I know that from actual experience because I have lived on the beach in Long Beach most of my life.

Mr. Taylor: Q. Can you see the Pier and Yacht Basin from these lots, Mr. Green?

A. I will put it this way: From the lot, no, but no one would consider a view without some particular structure on it. You can see it from any first-floor structure.

Q. Can you see the whole Pier and Yacht Basin from the top of a first-floor structure?

A. I don't know whether you can see all of it or not. You can see part of it.

(Deposition of Charles D. Green.)

Q. To get to the Pier and Yacht Basin you have to go down the Palisades?

A. Yes. There is a road down in front of the pier. [67]

Mr. Taylor: That is all.

Mr. Rorschach: That is all.

(S) CHARLES D. GREEN

(Signature of the Witness).

Subscribed and sworn to before me this 29th day of April, 1940.

[Seal]

(S) C. N. OLSON,

Notary Public in and for the County of Los Angeles, State of California. [68]

MRS. MAUD GILLESPIE,

called as a witness in behalf of the Petitioner, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Rorschach:

Q. Will you state your name, Mrs. Gillespie?

A. Maud Gillespie.

Q. Are you the one and the same person as Mrs. F. A. Gillespie? A. I am the same.

Q. And are you the same Maud Gillespie that was designated as beneficiary under a certain trust

(Deposition of Mrs. Maud Gillespie.)

agreement entered into between F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie on the 9th day of February, 1921 and attached to the petition which you have filed in the United States Board of Tax Appeals in this case and designated as Exhibit B?

A. Yes I am.

Q. You are the same Maud Gillespie?

A. Yes.

Q. Are you the same Maud Gillespie that entered into a certain agreement between F. A. Gillespie and Maud Gillespie on the 15th day of May, 1929 and attached to your petition filed in this case and designated as Exhibit C?

A. Yes I am.

Q. Are you the same Maud Gillespie that entered into a certain agreement on the 15th day of May, 1929, which agreement was between F. A. Gillespie, Maud Gillespie and F. A. Gillespie and Sons' Company, which agreement is attached to your petition and filed in this case and designated as Exhibit D?

[69]

A. Yes.

Q. Now, in accordance with the foregoing agreement did you set over and turn over property to F. A. Gillespie and Sons' Company?

A. Yes.

Q. What property did you turn over to the company as the result of this agreement, stating first the bonds and securities that were turned over?

A. Well I turned over United States bonds and State of Louisiana bonds to the amount of more than a million dollars.

(Deposition of Mrs. Maud Gillespie.)

Q. Did you turn over some other property to the company? A. Yes.

Q. Can you state what that property consisted of?

Mr. Taylor: May I ask what the purpose of this line of questioning is?

Mr. Rorschach: This is to show the transfer of this property pursuant to these contracts by Mrs. Gillespie, and the items of property.

Mr. Taylor: I see.

Mr. Rorschach: This is off the record.

(Discussion between counsel off the record).

(The reporter read the pending question).

A. Well, I turned over a building in Tulsa, Oklahoma called the Kress Building, and I turned over a home. I turned over \$100,000 in money, and in Oklahoma I turned over my interest in a stone quarry. I guess that was all.

Q. Did you turn over any property to the company pursuant to this agreement located in Santa Monica, California?

A. Yes. I had a fifth interest in some lots in Santa Monica which I turned over.

Q. Now, for the purposes of identification I hand you a deed dated the 18th of February, 1932 in which F. A. Gillespie and Maud Gillespie appear [70] as grantors and F. A. Gillespie and Sons' Company appears as grantee, conveying part of Lot 7 in Block 104 in the original town of Tulsa, and I ask you if that is your signature which appears at

(Deposition of Mrs. Maud Gillespie.)

the bottom of the deed, Maud Gillespie? (Handing document to the witness). A. Yes, it is.

Q. I hand you a deed dated the 18th of February, 1932 in which Frank A. Gillespie and Maud Gillespie appear as grantors and F. A. Gillespie and Sons' Company appears as grantee, conveying Lot 6 and the west thirty feet of Lot 7 in Block 8 of North Tulsa, addition to the City of Tulsa, and ask you if that is your signature which appears at the bottom of the deed? (Handing document to the witness).

A. Yes, that is my signature.

Q. I hand you a deed dated June 22, 1934 in which L. A. Gillespie, Maud Gillespie and B. A. Gillespie, being all of the directors of the Bromide Oolitic Stone Company, appear as grantors and F. A. Gillespie and Sons' Company appears as grantee, covering certain lands located in Sections 4 and 9 in Township 2 South, Range 8 East, Johnston County, Oklahoma, and ask you if the signature appearing at the bottom of the deed along with the signature of L. A. Gillespie and B. A. Gillespie is your signature? (Handing document to the witness). A. Yes, it is.

Q. I hand you a deed dated June 25, 1932, in which V. R. Irvin and Edna E. Ervin, his wife; M. C. Smith and Marjorie V. Smith, his wife; P. A. Gillespie and Marguerite Gillespie, his wife, and Maud Gillespie, a single woman, appear as grantors

(Deposition of Mrs. Maud Gillespie.)

and P. A. Gillespie appears as grantee covering Lots V. W and X in Block 148 of the City of Santa Monica, and ask you if among the other signatures appears your signature as Maud Gillespie? (Handing document to the witness).

A. Yes, that is my signature. [71]

Q. When were you and Mr. F. A. Gillespie married?

A. We were married on the 6th of February, 1892.

Q. When and where were you born?

A. I was born in Oil City, Pennsylvania.

Q. On what date? A. On June 9, 1872.

Q. 1872? A. 1872

Q. Do you know when and where Mr. A. F. Gillespie was born?

A. He was born in Oil City, Pennsylvania, and he was born on April 22, 1868.

Q. Now, at the time you and Mr. Gillespie were married did you own any property?

A. No, I did not.

Q. Did Mr. Gillespie own any property?

A. No he did not.

Q. During the time that you and Mr. Gillespie were married did either you or Mr. Gillespie inherit any property? A. No.

Q. Then the property to which you have testified and which is referred to in this contract was acquired during the time you and Mr. Gillespie were married? A. Yes.

(Deposition of Mrs. Maud Gillespie.)

Q. And was it acquired by the two of you?

A. By the efforts of both.

Q. Now, this contract of May 15, 1929 by which you were obliged to turn over this property to the company, did you turn over the property and execute the deeds and documents and conveyances and all the matters that pertained to the dividends of \$10,000 a year? Have you made any change with respect to those payments, or any amendment to that contract? [72]

A. Yes I have.

Q. Do you recall the nature of that change?

A. Well I was receiving—shall I tell you the amount I was receiving at that time?

Q. Yes.

A. I was receiving \$15,000 a year in monthly payments and at the end of the year \$10,000 I suppose in the nature of a dividend, and I turned back the \$10,000 to the company for investment provided that Mr. Gillespie would do the same thing.

Q. And has that agreement been carried out?

A. Yes it has.

Q. Now, under the terms of this contract entered into on May 15, 1929 did the company pay you anything during the calendar years 1929, 1930 and 1931?

A. No they did not.

Q. Did the company pay you anything in the year 1932?

A. Yes. I got \$19,500 in 1932.

Mr. Taylor: How is this material?

(Discussion off the record between counsel).

(Deposition of Mrs. Maud Gillespie.)

Mr. Taylor: I move to strike that answer on the ground of immateriality. [Denied. Exception allowed. S. B. H.]

Mr. Rorschach: Q. Now, did you receive any other sum in the year 1932?

Mr. Taylor: I object on the ground of immateriality.

A. Am I to answer the question?

Mr. Rorschach: Yes, you are to answer.

A. Oh, I thought he objected.

Mr. Taylor: My objection is just for the record.

A. Oh yes. Well, I received \$15,394.01.

Mr. Rorschach: Q. What was the nature of that payment? [73]

A. Well, that was to adjust the account——

Mr. Taylor: Objected to as immaterial.

A. —for the previous years of 1929, 1930 and 1931.

Mr. Rorschach: Q. How much did the company pay you in 1933?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. H.]

A. \$25,000.

Mr. Rorschach: Q. How much did the company pay you in 1934 on account of this contract?

Mr. Taylor: Objected to as immaterial. [Overruled—exception allowed. S. B. H.]

A. \$20,000.

Mr. Rorschach: Q. And how much did the company pay you in the year 1935?

(Deposition of Mrs. Maud Gillespie.)

A. \$17,666.25.

Q. Now, under this amended agreement the company was obliged to pay you \$15,000 for the year 1935. Can you explain the additional \$2,666.25 that was paid you in 1935 by the company?

A. Well, I had a mortgage on a building in Hollywood and I didn't have the money to pay it so they lent me the money to pay that mortgage off.

Q. And what was the amount of that that they let you have?

A. Well, they let me have \$2,666.25.

Q. How much did the company pay you in 1936?

A. \$19,000.

Q. And under the terms of this agreement—

Mr. Taylor: I object to that and I move to strike that last answer as immaterial. [Overruled. S. B. Hill.]

Mr. Rorschach: Q. Under the terms of this agreement you were to be paid \$15,000. Can you explain the additional \$4,000?

A. Well, they lent me \$4,000 to pay off the mortgage on this same building [74] that I mentioned before.

Q. Now, going back to the year 1934 you were entitled to receive \$15,000 under your amended contract in that year but you testified they paid you \$20,000. Can you explain the difference there of \$5,000?

Mr. Taylor: Objected to as immaterial. [Overruled. S. B. Hill]

(Deposition of Mrs. Maud Gillespie.)

A. The additional \$5,000 was an adjustment on the 1932 dividend guarantee.

Mr. Rorschach: Q. Now, how much did you receive from the company in 1937?

A. \$15,000.

Mr. Taylor: Objected to as immaterial. [Overruled. S. B. Hill.]

Mr. Rorschach: Q. How much did you receive in 1938?

Mr. Taylor: Objected to as immaterial. [Overruled. S. B. Hill.]

A. \$15,000.

Mr. Rorschach: Q. And how much have you received in 1939?

Mr. Taylor: Objected to as immaterial. [Overruled. S. B. Hill.]

A. \$15,000.

Mr. Rorschach: Q. And how have you been receiving these payments over the years?

Mr. Taylor: Objected to as immaterial. [Overruled. S. B. Hill.]

A. Well, twelve payments of \$1250.

Mr. Rorschach: Q. \$1250 every month.

A. Every month, yes.

Q. Now, with respect to the F. A. Gillespie and Sons' Company what interest or what beneficial interest have you considered that you owned in the company in accordance with the trust agreement of 1921?

(Deposition of Mrs. Maud Gillespie.)

Mr. Taylor: Objected to as immaterial. [Sustained. Exception allowed. S. B. Hill.]

A. A half interest.

Mr. Rorschach: I do not mean the property. I want to refresh your [75] recollection. The company and not the property now, the F. A. Gillespie and Sons' Company.

A. State the question again?

(The reporter read the pending question.)

A. Well, I had a one-fifth interest.

Q. And who owns the other beneficial four-fifths interest?

Mr. Taylor: Objected to as immaterial. [Sustained. Exception allowed. S. B. Hill.]

A. F. A. Gillespie and his three sons, my three sons.

Mr. Rorschach: Q. And is there any provision with respect to others in that trust agreement?

A. I don't understand that.

Q. Any provision with respect to other members of your family in that trust agreement?

Mr. Taylor: Objected to as the trust agreement is the best evidence.

Mr. Rorschach: Q. Do you have any provision in there with respect to your grandchildren?

A. Oh yes, surely, I turned this over so that my sons and my grandchildren would benefit by it.

Mr. Taylor: I move to strike that answer as not responsive, and immaterial. [Sustained. Exception allowed. S. B. Hill.]

(Deposition of Mrs. Maud Gillespie.)

Mr. Rorschach: Q. When you sold and transferred this property to the company in accordance with the contract of May 15, 1929, how did you contemplate being paid for your property?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. Well—state that again?

(The reporter read the pending question.)

A. Well, I was—I got my monthly payments. I don't think I hardly understand. [76]

Mr. Rorschach: Q. Well, did you expect to be paid at the rate of \$15,000 a year for life with this additional guarantee of \$10,000?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. Yes, that is right. That is what I did expect.

Mr. Rorschach: Q. And the residue in excess of the amount which you received, what did you expect to have done with that?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. Well, I figured that turned into the company for the benefit of my children and my grandchildren.

Mr. Rorschach: Q. Prior to May 15, 1929, had you ever made an inquiry from any insurance or trust company as to the cost of acquiring an annuity on your life?

(Deposition of Mrs. Maud Gillespie.)

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. No, I never did.

Mr. Rorschach: Q. Had you ever contemplated purchasing an annuity?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. No, I never did.

Mr. Rorschach: Q. When you and Mr. Gillespie had reached a property settlement what did you consider the best thing to do to safeguard your property interests and to protect your children and your grandchildren?

Mr. Taylor: Objected to as immaterial. The trust agreement is the best evidence. [Overruled. Exception allowed.]

A. Will you re-state that?

Mr. Rorschach: Repeat the question, please?

(The reporter read the pending question.)

A. Well, I made—I gave my property to the company to safeguard my children and my grandchildren.

Q. And with the provision that you were to be paid during your life-time? [77] A. Yes.

Q. Certain sums? A. Yes.

Q. And did you consider the remainder over the value of this property as a gift or contribution to your children?

Mr. Taylor: Objected to as immaterial, and the

(Deposition of Mrs. Maud Gillespie.)

trust agreement is the best evidence. [Overruled. Exception allowed. S. B. Hill.]

A. It was just a gift to my children and my grandchildren.

Mr. Taylor: I move to strike that answer on the same grounds. [Motion denied. Exception allowed. S. B. Hill.]

Mr. Rorschach: Q. Do you have any other children besides P. A. Gillespie or Parmer A. Gillespie, and L. A. or Lester A. Gillespie, and B. A. or Bernard A. Gillespie? A. No I don't.

Q. Were these three sons, Bernard, Lester and Parmer, sons born of your marriage with F. A. Gillespie? A. Yes, they were.

Q. Do these three sons have any children?

A. Yes.

Q. Can you name the grandchildren?

A. Well, there is Bernard Gillespie, Junior, and Jerry Gillespie and Gloria Gillespie and Frank Gillespie and Parmer Gillespie and Rhonda Gillespie.

Q. Now, will you state which of these grandchildren are the grandchildren of the sons—in other words, which are Lester's?

A. Lester's are two girls, Gloria and Jerry; Bernard has one son, Bernard, Junior; the other three belong to Parmer.

Q. Have you ever tried to borrow money or raise any money through a bank or trust company on the basis of the payments which you were to receive in the future in accordance with the contract

(Deposition of Mrs. Maud Gillespie.)

of May 15, 1929, which is between the company [78] and yourself?

Mr. Taylor: Objected to as immaterial. [Sustained. Exception allowed. S. B. Hill.]

A. No I have not.

Mr. Rorschach: Q. Have you ever made any inquiry as to whether you might be able to borrow on that contract?

Mr. Taylor: Objected to as immaterial. [Sustained. Exception allowed. S. B. Hill.]

A. No. I think I talked to one of my sons about it. I did. But I never tried to borrow anything.

Mr. Rorschach: Q. Did you have your son make any inquiry?

Mr. Taylor: Objected to as immaterial. [Sustained. Exception allowed. S. B. Hill.]

A. I think my son talked to the Security Bank but there could not be any money borrowed on this contract.

Mr. Rorschach: Q. Now, you have testified concerning the property which you conveyed to F. A. Gillespie and Sons' Company by virtue of this contract of May 15, 1929. What interest in this property that was conveyed did you consider that you owned?

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. Well, I owned half of it.

Mr. Rorschach: Q. And did you feel or consider that F. A. Gillespie owned the other half?

(Deposition of Mrs. Maud Gillespie.)

Mr. Taylor: Objected to as immaterial. [Overruled. Exception allowed. S. B. Hill.]

A. Yes I did.

Mr. Rorschach: I believe that is all.

(Discission between counsel off the record.)

Cross Examination

By Mr. Taylor:

Q. Mrs. Gillespie, you have testified that a change was made in the agreement [79] between yourself, Mr. F. A. Gillespie and the corporation to the effect that you turned \$10,000 and he turned \$10,000 over to the corporation for re-investment, is that correct? A. Yes.

Q. What that change made in writing or was that just an oral understanding between yourself and Mr. Gillespie?

A. Well I think—I am not sure but I think I wrote a letter to them saying that I would do that.

Q. When you say “them” to whom do you refer?

A. F. A. Gillespie and Sons’ Company. It was also verbal but I think I wrote them a letter saying I would do that.

Q. When was that?

A. Can you give me the date? I don’t remember the date, but it is—let’s see if I can get the date out of this. (Referring to sheet of paper.) I cannot give you the date. It has been a long time ago though.

(Deposition of Mrs. Maud Gillespie.)

Q. But it was prior to the year 1935?

A. Yes.

Q. Did that refer to just one single year?

A. No. It was from that time on.

Mr. Taylor: I would like to move to strike the testimony of Mrs. Gillespie with regard to her purpose in turning over certain property to the F. A. Gillespie and Sons' Company and her testimony with regard to turning over certain properties for the benefit of her children and grandchildren and her testimony with regard to making a gift or intent to make a gift to her children and grandchildren on the ground that the testimony and each item thereof are immaterial; on the ground that the testimony is in conflict with the parol-evidence rule; on the further ground the agreements attached as Exhibits C and D to the petition in this case are the best evidence as to why Mrs. Gillespie turned over this property, if [80] that is considered material, and as to the rights that she and others obtained thereunder, and are also the best evidence as to her purpose in turning over her property and as to whether any gifts were made to her children and grandchildren by turning over the property. [Motion denied. Exception allowed. S. B. Hill.]

I have no more questions. That is all at this time.

(Deposition of Mrs. Maud Gillespie.)

Mr. Rorschach: I offer in evidence as Petitioner's Exhibit number 1 deed heretofore referred to as deed dated February 18, 1932, between F. A. Gillespie and Maud Gillespie, grantors and F. A. Gillespie and Sons' Company, grantee, conveying part of Lot 7 in block 104, original town of Tulsa, Oklahoma.

(Whereupon the notary marked said above-mentioned deed "Petitioner's Exhibit number 1 for identification. C. N. Olson, notary public. 4/27-'40.'")

PETITIONER'S DEPOSITION EXHIBIT

NO. 1

[Book 1014, Page 302

465197]

GENERAL WARRANTY DEED

This Indenture: Made this 18th day of February, A. D. 193....., between F. A. Gillespie and Maud Gillespie, husband and wife, of Tulsa County, in the State of Oklahoma, parties, grantors, and F. A. Gillespie & Sons, a corporation, of Tulsa, Oklahoma, party, grantee.

Witnesseth, That in consideration of the sum of Dollars, receipt of which is hereby acknowledged, said parties, grantors, do, by these presents, grant, bargain, sell and convey unto said party, grantee, its assigns, all of the following described real estate, situated in the County of Tulsa, State of Oklahoma, to-wit:

(Deposition of Mrs. Maud Gillespie.)

All that part of Lot Seven (7) in Block One Hundred Four (104), of the Original Town, now City of Tulsa (Tulsa County), Oklahoma, described as follows, to-wit:

Beginning at the Southwest corner of said lot, running thence Northerly along the West line of said lot 75 feet 9½ inches; running thence Easterly 59 feet 6½ inches to a point 75 feet 9 inches Northerly and at right angles from the South line of said lot; thence Southerly parallel with the West line of said lot 25 feet 9 inches; thence Easterly on a line parallel with the South line of said lot 5 feet 5½ inches; thence Southerly on a line parallel with the Westerly line of said lot 50 feet to the Southerly line of said lot, and thence Westerly along the Southerly line of said lot 65 feet to the place of beginning.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining forever.

And said parties, grantors, F. A. Gillespie and Maud Gillespie, their heirs, executors or administrators do hereby covenant, promise and agree to and with said part... grantee..., at the delivery of these presents that they lawfully seized in their own right of an absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted and described premises, with the appur-

(Deposition of Mrs. Maud Gillespie.)

tenances; that the same are free, clear, and discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances, of whatsoever nature and kind.

Except: leases and encumbrances of record, and all other liens, and that parties grantors will warrant and forever defend the same unto the said party grantee, its assigns, against said parties, grantors, their heirs or assigns and all and every person or persons whomsoever lawfully claiming or to claim the same.

In witness whereof, the said parties grantors, have hereunto set their hands the day and year first above written.

MAUD GILLESPIE,
F. A. GILLESPIE.

OKLAHOMA FORM OF ACKNOWLEDGMENT.

State of Oklahoma, County of Oklahoma—ss.

On this 18th day of February, A. D. 1932, before me, the undersigned, a Notary Public, in and for said County and State aforesaid personally appeared F. A. Gillespie and husband and wife, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that they executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

(Deposition of Mrs. Maud Gillespie.)

Given under my hand and seal of office the day and year last above written.

[Seal]

PEARL KIMBLE,
Notary Public.

My commission expires Sept. 9, 1935. [83]

[Book 1014, Page 303]

State of Oklahoma, County of Tulsa—ss.

On this 18th day of February, A. D. 1932, before me, the undersigned, a Notary Public, in and for said County and State aforesaid personally appeared Maud Gillespie, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal of office the day and year last above written.

NORMA WHEATON,
Notary Public.

My commission expires Sept. 12, 1935.

No. 465197

General Warranty Deed

From

F. A. Gillespie, et ux
to

F. A. Gillespie & Sons Company,
Box 1925, Tulsa

Recorded Feb. 23, 1932. [84]

(Deposition of Mrs. Maud Gillespie.)

Mr. Rorschach: I offer in evidence as Petitioner's Exhibit number 2 deed heretofore described as deed from Frank A. Gillespie and Maud Gillespie, husband and wife, grantors to F. A. Gillespie and Sons' Company, grantee, dated February 18, 1932, conveying Lot 6 and the west thirty feet of Lot 7, Block 8 of North Tulsa, addition to the City of Tulsa, Oklahoma.

(Whereupon the notary marked said above-mentioned deed "Petitioner's Exhibit number 2 for identification. C. N. Olson, notary public. 4/27-'40.")

PETITIONER'S DEPOSITION EXHIBIT

No. 2

[Book 1014, Page 300

465196]

GENERAL WARRANTY DEED

This Indenture: Made this 18th day of February, A. D. 193....., between Frank A. Gillespie and Maud Gillespie, husband and wife, of Tulsa County, in the State of Oklahoma, parties, grantors, and F. A. Gillespie & Sons Company, a corporation of Tulsa, Oklahoma, party, grantee,

Witnesseth, That in consideration of the sum of DOLLARS, receipt of which is hereby acknowledged, said parties grantors, do, by these presents, grant, bargain, sell and convey unto said party grantee, its assigns, all of the following described real estate, situated in the County of Tulsa, State of Oklahoma, to-wit:

(Deposition of Mrs. Maud Gillespie.)

Lot Six (6) and the West thirty feet (30 ft.) of Lot Seven (7), all in Block Eight (8) of North Tulsa, an addition to the City of Tulsa.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining forever.

And said parties grantors, Frank A. Gillespie and Maud Gillespie, their heirs, executors or administrators do hereby covenant, promise and agree to and with said part... grantee..., at the delivery of these presents that they lawfully seized in their own right of an absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, and discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances, of whatsoever nature and kind,

Except: taxes and special assessments, and all other liens, and that parties grantors will warrant and forever defend the same unto the said party grantee, its assigns, against said parties grantors, their heirs or assigns and all and every person or persons whomsoever lawfully claiming or to claim the same.

In witness whereof, the said parties grantors, have hereunto set their hands the day and year first above written.

MAUD GILLESPIE,
FRANK A. GILLESPIE.

(Deposition of Mrs. Maud Gillespie.)

OKLAHOMA FORM OF ACKNOWLEDGMENT.

State of Oklahoma, County of Tulsa—ss.

On this 18th day of February, A. D. 1932, before me, the undersigned, a Notary Public, in and for said County and State aforesaid personally appeared Frank A. Gillespie and husband and wife, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal of office the day and year last above written.

[Seal]

PEARL KIMBLE,
Notary Public.

My commission expires Sept. 9, 1935. [85]

[Book 1014, Page 301]

State of Oklahoma, County of Tulsa—ss.

On this 18th day of February, A. D. 1932, before me, the undersigned, a Notary Public, in and for said County and State aforesaid personally appeared Maud Gillespie, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

(Deposition of Mrs. Maud Gillespie.)

Given under my hand and seal of office the day and year last above written.

NORMA WHEATON,
Notary Public.

My commission expires Sept. 12, 1932.

No. 465196

General Warranty Deed

From

Frank A. Gillespie, et ux,

to

F. A. Gillespie & Sons Company,

Box 1925

Recorded Feb. 23, 1932. [86]

Mr. Rorschach: I offer in evidence as Petitioner's Exhibit 3 that certain deed heretofore described, dated the 22nd of June, 1934, in which L. A. Gillespie and Maud Gillespie and B. A. Gillespie, being all of the directors of the Bromide Oolitic Stone Company appear as grantors and F. A. Gillespie and Sons' Company as grantee, covering certain lands located in Sections 4 and 9 in Township 2 South, Range 8 East, Johnston County, Oklahoma.

(Whereupon the notary marked said above-mentioned deed "Petitioner's Exhibit number 3 for identification. C. N. Olson, notary public. 4/27-'40.")

(Deposition of Mrs. Maud Gillespie.)

PETITIONER'S DEPOSITION EXHIBIT

NO. 3

GENERAL WARRANTY DEED.

This Indenture, Made this 22nd day of June, A. D. 1934, between L. A. Gillespie, Maud Gillespie and B. A. Gillespie, "Being all of the Directors of the Bromide Oolitic Stone Company", Trustees, of Tulsa County, in the State of Oklahoma, of the first part, and F. A. Gillespie & Sons Company, an Oklahoma Corporation, of the second part.

Witnesseth, That in consideration of the sum of Ten (\$10.00) dollars, the receipt whereof is hereby acknowledged, said parties of the first part, does by these presents grant, bargain, sell and convey unto said party of the second part, its heirs and assigns, all of the following described real estate situated in the County of Johnston, State of Oklahoma, to-wit:

The West Half ($W\frac{1}{2}$) of the Southwest Quarter ($SW\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) and the West Half ($W\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$); and the North Half ($N\frac{1}{2}$) of the Southwest Quarter ($SW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$); and the Southeast Quarter ($SE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section Four (4), and the Northeast Quarter ($NE\frac{1}{4}$) and the South Half ($S\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); and the East Half ($E\frac{1}{2}$) of

(Deposition of Mrs. Maud Gillespie.)

the Southwest Quarter ($SW\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); and the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); and the Northeast Quarter ($NE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) and the East Half ($E\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$); and the North Half ($N\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$); and the Southeast Quarter ($SE\frac{1}{4}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$); and the West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$); and the West Half ($W\frac{1}{2}$) of the East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Nine (9), Township Two (2) South, Range Eight (8) East.

stamp

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining forever.

And said L. A. Gillespie, Maud Gillespie, & B. A. Gillespie, Trustees, their heirs, successors, executors or administrators, does hereby covenant, and agree to and with said party of the second part at the delivery of these presents they are lawfully seized in their own right of an absolute and indefeasible estate of inheritance in fee simple, of and in, all and singular, the above granted and described premises, with appurtenances; that the same are free, clear and discharged and unincumbered of and from

(Deposition of Mrs. Maud Gillespie.)

all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances, of whatsoever nature and kind, except none, and that they will warrant and forever defend the same unto said party of the second part, its heirs, and assigns, against said parties of the first part, their heirs and successors assigns, and all and every person or persons whomsoever, lawfully claiming or to claim the same.

In witness whereof, the said parties of the first part have hereunto set their hands this the day and year first above written.

BROMIDE OOLITIC STONE COMPANY,

By L. A. GILLESPIE,

MAUD GILLESPIE,

B. A. GILLESPIE,

Trustees.

[87]

OKLAHOMA ACKNOWLEDGMENT.

State of Oklahoma, County of Tulsa—ss.

Before me, the undersigned, a Notary Public, in and for said County and State, on this 22nd day of June, 1934, personally appeared L. A. Gillespie, Maud Gillespie and B. A. Gillespie, Trustees of the Bromide Oolitic Stone Company and to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that have executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

(Deposition of Mrs. Maud Gillespie.)

Given under my hand and seal the day and year last above written.

[Seal]

RUTH REYNOLDS,
Notary Public.

My commission expires April 14, 1938.

ACKNOWLEDGMENT FOR CORPORATION.

State of Oklahoma, County of Tulsa—ss.

On this 22nd day of June, A. D. 1934, before me, the undersigned, a Notary Public, in and for the County and State aforesaid, personally appeared L. A. Gillespie, B. A. Gillespie and Maud Gillespie, to me known to be the identical persons who subscribed the name of the maker thereof to the foregoing instrument as its Directors & Trustees and acknowledged to me that they executed the same as their free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Given under my hand and seal of office the day and year last above written.

[Seal]

RUTH REYNOLDS,
Notary Public.

My commission expires April 14, 1938.

(Deposition of Mrs. Maud Gillespie.)

No. 66256—Form No. 30

General Warranty Deed

State of Oklahoma, County of Johnston—ss.

This instrument was filed for record on the 10th day of Oct., 1934, at 1:20 o'clock P. M., and duly recorded in Book 43D, Page 521 of the records of this office.

G. R. WHITE,

County Clerk—Register of Deeds.

By LENA THOMAS, Deputy.

When recorded return to F. A. Gillespie & Sons Company, Box 1925, Tulsa, Oklahoma. [88]

Mr. Rorschach: I offer in evidence as Petitioner's Exhibit number 4 grant [81] deed heretofore referred to, dated June 25, 1932, wherein V. R. Irvin and Edna E. Irvin, his wife; M. C. Smith and Marjorie V. Smith, his wife; P. A. Gillespie and Marguerite Gillespie, his wife, and Maud Gillespie, a single woman, appear as grantors and P. A. Gillespie appears as grantee, covering Lots V. W. and X in Block 148 of the City of Santa Monica, California.

(Whereupon the notary marked said above-mentioned deed "Petitioner's Exhibit number 4 for identification. C. N. Olson, notary public. 4/27-'40.")

(Deposition of Mrs. Maud Gillespie.)

PETITIONERS'S DEPOSITION EXHIBIT

NO. 4

GRANT DEED

V. R. Irvin and Edna E. Irvin, his wife

M. C. Smith and Marjorie V. Smith, his wife

P. A. Gillespie and Marguerite Gillespie, his wife

Maude Gillespie, a single woman

in consideration of ten dollars and other valuable considerations to him in hand paid, the receipt of which is hereby acknowledged, does hereby

Grant to P. A. Gillespie all that real property situated in the City of Santa Monica, County of Los Angeles, State of California, described as follows:

Lots "V", "W" and "X" in Block One Hundred Forty-eight (148) as per map recorded in Book 39, Page 45, et. sec., Miscellaneous Records of said County.

Subject to: Taxes, Conditions, restrictions, reservations and rights of way of record.

Street Bonds of Record.

To Have and to Hold to the said grantee, his heirs or assigns.

Witness our hand this 25th day of June, 1932.

V. R. IRVIN & EDNA E. IRVIN,

M. C. SMITH & MARJORIE V. SMITH

P. A. GILLESPIE MARGUERITE

GILLESPIE

MAUDE GILLESPIE

(Deposition of Mrs. Maud Gillespie.)

State of California

County of Los Angeles—ss.

On this 28th day of June A. D., 1932, before me a Notary Public in and for said County, personally appeared V. R. Irvin, Edna E. Irvin, M. C. Smith and Marjorie V. Smith, known to me to be the persons whose names are subscribed to the within Instrument, and acknowledged that they executed the same.

Witness my hand and official seal.

[Seal] T. O. McCOY

Notary Public in and for said County and State.

My Commission Expires January 14, 1933.

State of California

County of Los Angeles—ss.

On this 29th day of June, A. D., 1932, before me, Frances L. Crofts, a Notary Public in and for said County and State, personally appeared Maude Gillespie, known to me (or proved to me on the oath of), to be the person whose name is subscribed to the within Instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

FRANCES L. CROFTS

Notary Public in and for said County and State.

(Deposition of Mrs. Maud Gillespie.)

State of Oklahoma,

County of Tulsa—ss.

Before me, the undersigned Notary Public, in and for said County and State, on this 25th day of June, 1932, personally appeared P. A. Gillespie and Marguerite Gillespie, his wife, personally known to me to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

RUTH REYNOLDS,

Notary Public.

My commission expires April 14, 1934. [91]

Escrow No. 779

Order No.

When recorded, please mail to P. A. Gillespie, 602 National Bank of Commerce Bldg, Tulsa, Okla.

Recorded June 29, 1932. [90]

Mr. Rorschach: And it is hereby stipulated and agreed by and between respective counsel of record that the foregoing exhibits of the Petitioner, numbered from one to four, may be withdrawn and retained in the custody of Petitioner's counsel, subject to being produced at the trial of this case at Oklahoma City, Oklahoma, on or after May 13, 1940.

(Deposition of Mrs. Maud Gillespie.)

Mr. Taylor: So stipulated.

(S)

MAUD GILLESPIE

(Signature of the witness)

Subscribed and sworn to before me this 29th day of April, 1940.

(Seal)

(S) C. N. OLSON

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: U.S.B.T.A. Filed May 1, 1940. [82]

[Title of Board and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto and by and between their respective counsel that the following facts should be taken as true. This stipulation is entered into without prejudice to the right of either party to offer and introduce further evidence not inconsistent with the facts herein stipulated to be taken as true.

I.

Mrs. Maud Gillespie and F. A. Gillespie, husband and wife, conveyed to F. A. Gillespie & Sons Company on May 15, 1929, pursuant to a contract entered into between F. A. Gillespie and Maud Gillespie and F. A. Gillespie & Sons Company, dated the 15th day of May, 1929, copy of which agreement is set out and attached to petitioner's petition and

(Deposition of Mrs. Maud Gillespie.)

marked Exhibit "D", the following property which had a fair market value as of May 15, 1929, of not less than the amounts set out below: [92]

Item	Amount
U. S. First Liberty Loan Bonds and Port of New Orleans, Louisiana State Bonds	\$1,172,000.00
Empress Building, Tulsa, Oklahoma	150,000.00
Sundry lands and lots located in Oklahoma	22,512.00
Cash and Accounts Receivable.....	94,365.22
Sundry Stocks	25,363.00
Total	\$1,464,240.22

The cost of the above property to F. A. Gillespie and Maud Gillespie equalled or exceeded the above fair market value.

II.

Maud Gillespie was born June 9, 1872. F. A. Gillespie was born August 22, 1868.

An annuity could have been purchased from a reputable life insurance company doing business in the United States on the 15th day of May, 1929, upon the life of a male individual born in the United States on August 22, 1868, which would have paid \$15,000 per annum to said male individual for his life for the sum of \$153,750.

An annuity could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$15,000 per annum to said female individual for her life for the sum of \$196,537.50. An annuity could have been purchased [93] from a reputable life insurance company doing business in the United States on May 15, 1929, upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$20,000 per annum to said female individual for her life for the sum of \$262,050. An annuity could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$25,000 per annum to said female individual for her life for the sum of \$327,562.50.

HAROLD E. RORSCHACH

Counsel for Petitioner

J. P. WENCHEL

JLB

Counsel for Respondent.

[Endorsed]: U.S.B.T.A. Filed May 16, 1940. [94]

[Title of Board and Cause.]

REPORTER'S MINUTES

Hearing at Oklahoma City, Okla., on the 16th day of May, 1940, at 3:15 p. m.

The above-entitled proceeding came on for hearing on Thursday, the 16th day of May, 1940, before the Honorable Samuel B. Hill, Member of the United States Board of Tax Appeals, at Oklahoma City, Okla., pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had and testimony heard, to-wit:

APPEARANCES:

Harold E. Rorschach, Esq., 529 McBirney Building, Tulsa, Okla., appearing on behalf of Petitioner.

Stanley B. Anderson, Esq. (Hon. J. P. Wenchel [97] Chief Counsel, Bureau of Internal Revenue), 810 First National Building, Oklahoma City, Okla., appearing on behalf of Commissioner of Internal Revenue, Respondent. [98]

Proceedings

The Clerk: Docket No. 98770. Maud Gillespie.

The Member: Announce your appearances for the record, please.

Mr. Rorschach: Harold E. Rorschach, for the petitioner.

Mr. Anderson: S. B. Anderson, for respondent.

The Member: State the case for the petitioner.

STATEMENT OF CASE ON BEHALF OF
PETITIONER:

By Mr. Rorschach:

Mr. Rorschach: Your Honor, in this case the Commissioner of Internal Revenue has sought to include the sum of \$17,666.25 in the income of the taxpayer, Maud Gillespie, for the calendar year 1935, on the ground that this sum is entirely taxable as an annuity growing out of a certain contract of May 15, 1929.

It is the petitioner's contention, first, that the taxpayer received a sum of \$15,000 and the sum of \$2,666.25 in the nature of a loan.

Next, it is the petitioner's contention that no amount of this sum, at any rate, was taxable, for three reasons:

"First, it is in payment of the acquisition of property, which, as a cash cost of the taxpayer, was in excess of the amount received up to and including the year 1935.

The Commissioner has contended that this payment is in the nature of an annuity and under the applicable Revenue Act that three percent of the purchase price or the cost of an annuity is taxable. The purchase price being in excess of a million dollars, the Commissioner contends that it is all taxable.

The petitioner contends that if the Commissioner is correct, that it is an annuity, then section 22 of the Revenue Act as pertains to annuities is unconstitutional—void, as pertains to the petitioner in this case.

The Member: I did not understand what you said the Commissioner contends. Will you repeat that?

Mr. Rorschach. The Commissioner has contended that this sum, \$17,666.25, is in the nature of an annuity paid by F. A. Gillespie & Sons Company to the taxpayer, Maud Gillespie.

The applicable statute of 1935 provides that an annuity is to be taxed on the basis of 3 percent of the cost, if Your Honor recalls that section of the statute.

The Commissioner, then, proceeds with his calculation and says the cost of the annuity was in excess of a million dollars, and 3 percent of that, of course, would be \$30,000, and that is in excess of the \$17,666.25; therefore, it is all taxable.

We do not admit that it is an annuity, but if it is an annuity our position is, then, the taxing on that basis by the Commissioner would, in effect, invalidate that portion [100] of section 22 for the reason that it would be an unconstitutional taking of the taxpayer's property, not within the purview of the sixteenth amendment. The sixteenth amendment only proposes to levy a tax on income, or permit the levy of a tax on income.

But petitioner contends that if it is an annuity, then it can be taxable only—assuming that section 22 is constitutional, then the taxpayer can only be taxed upon what an annuity would have cost at the date this contract was entered into, to wit: May 15, 1929, and taxed upon 3 percent of what that annuity would have cost, and that would amount to about

\$9,000 a year of this \$15,000 a year annual payment.

This annual payment grows out of a contract which will be placed in evidence. This contract was entered into between Mrs. Maud Gillespie and Mr. F. A. Gillespie May 15, 1929, in favor of F. A. Gillespie & Sons Company, an Oklahoma corporation, and these payments are made as a result of that contract. Annual payments, or annual sums, payable monthly, are paid as a result of this contract. And it is upon that sum that the Commissioner is seeking to increase the taxpayer's taxable income and thereby increase the tax.

First, we say it is a mere purchase of assets.

Denying that, then we say if the Commissioner is attempting to tax all of this amount as an annuity, then it is, in effect—— We do not say that section 22 is [101] unconstitutional generally, but we say in this effect it must be unconstitutional.

The Member: Any statement on behalf of the respondent?

Mr. Anderson: I believe the petitioner has correctly stated the issues, Your Honor.

Mr. Rorschach: There is a stipulation of facts which we would like to submit; I mean, a deposition and stipulation of facts.

The Member: The deposition will be received as evidence.

Mr. Anderson: Also, the cross-examination?

The Member: With the cross-examination included.

Mr. Rorschach: This was taken at Beverly Hills, Calif., April 27, 1940.

Now, we have a stipulation of facts here which stipulate a portion of the facts in this case, and I would like to enter that at this time.

The Member: The stipulation of facts will be received in evidence.

Mr. Rorschach: Now, after the time of the taking of this deposition in California it was stipulated by and between the respective counsel that exhibits Nos. 1, 2, 3, and 4, which were placed in evidence along with the deposition, might be retained by petitioner's counsel and produced at this hearing.

I now have the exhibits, Nos. 1, 2, 3, and 5, and I ask [102] leave of Your Honor to substitute photostatic copies of these exhibits, being four deeds from the records of the petitioner.

The Member: They are already in evidence with the deposition.

Mr. Rorschach: Yes.

The Member: There is no objection to the photostatic copies, I take it?

Mr. Anderson: No.

The Member: You may have the privilege of substituting photostatic copies for the exhibits named.

Mr. Anderson: There are some objections in this deposition.

The Member: Off the record.

(Thereupon the objections contained in the deposition were discussed and ruled upon off the record.)

The Member: I will say this for the record, that I have indicated rulings on certain objections and motions in the deposition of Charles D. Green and Maud Gillespie, in evidence in this proceeding, and reserve rulings on all objections and motions made in connection with such depositions as to which no such ruling is indicated in the deposition.

Mr. Rorschach: And in the event any motions—

The Member: Exceptions will be allowed to the party against whom the ruling is made. [103]

Mr. Rorschach: Mr. Murphy.

EVIDENCE ON BEHALF OF PETITIONER:

Thereupon, the petitioner, to maintain the averments of her petition, introduced the following proof.

A. N. MURPHY,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rorschach:

Q. Will you state your name?

A. A. N. Murphy.

Q. Are you an officer of a bank?

A. I am.

Q. Of what bank are you an officer?

A. First National Bank & Trust Company of Oklahoma City.

(Testimony of A. N. Murphy.)

Q. What office do you hold with the First National Bank & Trust Company?

A. Assistant trust officer.

Q. As an officer of the First National Bank & Trust Company have you had up for your consideration and the consideration of your discount committee loans secured by agreements covering deferred agreements for the purchase of personal property, real property, and oil and gas property, [104] in the State of Oklahoma? A. I have.

Q. I hand you an agreement dated the 15th of May 1929, which is exhibit D attached to the petitioner's petition, and ask you to examine same and state if similar agreements have been tendered to you, on behalf of your bank, evidencing the right of the grantor to receive income similar to this agreement. A. They have.

Q. I ask you again to refer to the agreement which is attached to the petitioner's petition, and marked exhibit D, dated May 15, 1929, and ask you if you have an opinion as to whether or not your bank would make a loan to either F. A. Gillespie or Maud Gillespie, taking as collateral for the loan an assignment of the payments to be made to either F. A. Gillespie or Maud Gillespie.

Mr. Anderson: I object.

The Member: I think you are restricting it too much there. One bank might be willing to, and another bank might not be willing to.

(Testimony of A. N. Murphy.)

Mr. Anderson: I will object on the other ground that it is immaterial.

The Member: I do not know whether it is or not. I will overrule the objection on that ground.

By Mr. Rorschach: [105]

Q. Will you state whether you have an opinion as to whether your bank or any other commercial bank would or would not make a loan——

Mr. Anderson (Interrupting). I object to that, Your Honor, as to his stating his opinion of what another bank would do.

The Member: What I had in mind was whether, as a banker, his experience, if any, gives him an opinion in the nature of an expert opinion as to whether such commercial paper would be deemed by the bank as collateral.

Mr. Anderson: I object, Your Honor. He has not been qualified to give an expert opinion.

Mr. Rorschach: He stated he was assistant trust officer of the First National Bank & Trust Company and has taken up matters similar to this contract with the discount committee of his bank, and identified the contract, and stated he examined a contract similar to this contract.

Of course, I will admit, Your Honor, some bankers may not be qualified, but I believe, Your Honor, most bankers generally are conceded to be.

The Member: That seems to be the point, whether his own bank would recognize it as a basis for loans.

(Testimony of A. N. Murphy.)

By Mr. Rorschach:

Q. Let me ask you, Mr. Murphy: How long have you been with the First National Bank & Trust Company of [106] Oklahoma City?

A. More than 10 years.

Q. In the last 10 years have you discussed contracts of this nature with national bank examiners and examiners for the Federal Deposit Insurance Corporation? A. I have.

Q. Have you an opinion, then, as to whether or not a so-called commercial loan could be based upon such a contract as this? That is, could such a contract be considered by a commercial bank as collateral security for a loan?

A. I have such opinion.

Q. Will you state what that opinion is?

A. It would have no value for a commercial loan, not only in the bank I am associated with but other banks in this section of the country.

Q. Will you state the reason for that opinion?

A. It has no set value. It is speculative, because the payments of money provided there cease upon the death of the party.

Mr. Anderson: Just a minute. I would like the record to show, Your Honor, I am objecting to all this line of testimony as being immaterial.

The Member: Objection overruled. Exception allowed.

The Witness: I might say, further, I am satisfied that if they did make such a loan the national

(Testimony of A. N. Murphy.)

bank examiners [107] would require them to charge it off.

Mr. Anderson: I move that that be stricken as hearsay.

The Member: I think it is within the scope of his qualifications. I will overrule the objection. He is stating his own opinion. He is not giving it as hearsay.

By Mr. Rorschach:

Q. Referring again to the agreement dated May 15, 1929, and marked exhibit D, and attached to the petitioner's petition, I ask you if this is an unusual form of agreement.

Mr. Anderson: Objected to as immaterial, Your Honor, whether the agreement is a usual or unusual agreement. We have an agreement.

The Member: I will sustain the objection.

By Mr. Rorschach:

Q. Have you had experience with any other agreements similar to the agreement dated May 15, 1929, and marked exhibit D, and attached to the petitioner's petition?

Mr. Anderson: That is objected to as immaterial. The proper foundation has not been laid.

The Member: Objection overruled.

A. I have.

By Mr. Rorschach:

Q. What experience have you had with other agreements of a similar character, covering the

(Testimony of A. N. Murphy.)

sale of personal property and oil properties in the State of Oklahoma? [108]

Mr. Anderson: Objected to as immaterial.

The Member: Objection overruled.

A. They have been up in our discount department through matters of applications for loans. We have handled quite a few in our trust department, sometimes involved in a trust and sometimes in an escrow.

Those are the direct experiences I have had with such matters.

Q. Do you know of any bank or financial house that makes a business of buying annuities?

A. I do not.

Q. As far as you know, do annuities have a market value?

A. I don't believe they have.

Q. Has your bank ever made a loan, as far as you know, taking an annuity or an assignment of an annuity income as security?

Mr. Anderson: Objected to as immaterial, Your Honor, all of this line of questioning.

The Member: What is the idea of this?

Mr. Rorschach: We are trying to show, Your Honor—The Government has contended this contract is an annuity contract, and we are trying to show that it has no value if it is an annuity contract, which we say it isn't, but the Government says it is. [109]

(Testimony of A. N. Murphy.)

The Member: That it has no asset value for security? Is that what you are trying to show?

Mr. Rorschach: We are trying to show that it has no asset value and no loan value.

The Member: I will overrule the objection, then.

Mr. Rorschach: Read the question, please.

(Thereupon the last question was read by the reporter as recorded.)

A. None, to my knowledge. I believe if it had, it would have been called to my attention.

Mr. Rorschach: That is all.

Mr. Anderson: No questions.

Witness excused.

Mr. Rorschach: Miss Reynolds, please.

RUTH REYNOLDS,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rorschach:

Q. Will you state your name, please?

A. Ruth Reynolds.

Q. Where do you live?

A. Tulsa, Okla.

Q. What position do you hold with F. A. Gillespie [110] & Sons Company?

(Testimony of Ruth Reynolds.)

A. Assistant secretary.

Q. As such assistant secretary do you have charge of the books and records of F. A. Gillespie & Sons Company? A. I do.

Q. How long have you been employed and been associated with F. A. Gillespie & Sons Company?

A. Since February, 1932.

Q. I hand you an agreement of May 15, 1929, which is attached to the petitioner's petition, marked exhibit D, and ask you if F. A. Gillespie & Sons Company received the property from F. A. Gillespie and Maud Gillespie as set out in the agreement?

A. Yes. F. A. Gillespie and Maud Gillespie turned over Government and State bonds, and real estate in California and Oklahoma, in excess of one million dollars.

Q. I hand you exhibit No. 1, which is attached to the deposition previously admitted in evidence, and ask you what it is?

A. This is a deed covering the Empress property in Tulsa, on which the Kress Company now has a building.

Q. Is it leased to the Kress Company?

A. Yes, it is.

Q. For a term of years?

A. It is leased for a term of years, at an annual [111] rental of \$12,000.

Q. Is that the Empress Building?

(Testimony of Ruth Reynolds.)

A. It is the Empress Building property on which the Kress Company now has their own building.

Q. I hand you exhibit No. 3, previously attached to the deposition, and ask you to state what property it covers.

A. This covers the transfer of F. A. Gillespie & Sons Company of our line plant land, which is 550 acres in Johnston County, Oklahoma.

Q. I hand you exhibit No. 2, which has previously been attached to the deposition, and ask you what it covers?

A. This covers the transfer to the corporation of the Gillespie residence property in Tulsa.

Q. Located in Tulsa County, Oklahoma?

A. That is right.

Q. I hand you exhibit No. 4, which has previously been attached to the deposition and heretofore admitted, and ask you to state what it is.

A. This transfers the interest owned by Maud Gillespie and others in a certain three blocks in Santa Monica, Calif.

Q. To whom?

A. To P. A. Gillespie.

Q. In this exhibit No. 4 you will note the name P. A. Gillespie. Who is P. A. Gillespie? [112]

A. P. A. Gillespie is Vice President of F. A. Gillespie & Sons Company, and the deed was taken in his name for convenience. And simultaneously he and his wife executed the deed to the corporation which was held unrecorded in the files.

(Testimony of Ruth Reynolds.)

Q. Do you have the minute book of the corporation with you? A. I do.

Q. Will you turn to the Minutes of the directors' meeting held February 18, 1932, and read the minutes of that meeting from the minute book?

A. "Minutes of a special meeting of the directors of F. A. Gillespie & Sons Company, held at the office of the company, National Bank of Commerce Building, Tulsa, Okla., February 18, 1932, at 10:30 o'clock a.m.

"The meeting was called to order by F. A. Gillespie, the president, and he presided until it adjourned.

"In the absence of the secretary, Pearl Kimble, the assistant secretary, performed the duties of her office until the close of the meeting.

"The books of the company were produced, examined, and read, and it was shown that the following were the directors of the company: F. A. Gillespie, Maid Gillespie, and Palmer A. Gillespie.

"The assistant secretary read the call and waiver of [113] notice for the meeting. It is as follows:

"Call and waiver of notice.

"A special meeting of the directors of P. A. Gillespie & Sons Company will be held at the office of the company, National Bank of Commerce Building, Tulsa, Okla., on February

(Testimony of Ruth Reynolds.)

18, 1932, at 10:30 o'clock a.m. This meeting is held for the purpose of transacting of business which may come before the meeting. Dated February 17, 1932. F. A. Gillespie, President. The undersigned, being all directors of F. A. Gillespie & Sons Company, hereby waive any and all requirements as to the notice of the time, place, and purpose of the above referred to meeting and consent to the holding thereof, and specifically consent to the transaction there of all business which may come before the meeting.

“Dated February 18, 1932.

“Signed, F. A. Gillespie, Maud Gillespie, Palmer A. Gillespie.

“The secretary called the roll of directors and the following directors answered ‘present’:

“F. A. Gillespie and Palmer A. Gillespie.

“The president announced that all of the directors, having waived in writing, the time, place, and purpose of the meeting, and the majority of the directors being present, the meeting was competent to transact such business as might come before it. [114]

“The assistant secretary stated that on May 15, 1929, the corporation had entered into a contract with F. A. Gillespie, which contract was executed by the president, and the corporate seal thereon attested by the secretary, and that since that time all of the parties to

(Testimony of Ruth Reynolds.)

the contract had been acting thereunder, and that some of the parties to the contract believed it would be beneficial to all parties to have the contract ratified and approved by all directors.

“The following resolution was offered, and the motion unanimously adopted:

“Whereas this company, acting through its president and secretary, has heretofore entered into a contract, dated May 15, 1929, by and between F. A. Gillespie, Maud Gillespie, and F. A. Gillespie & Sons Company, and

“Whereas the acquisition by this company of the properties and assets referred to in said contract are of great value and largely in excess of the amounts provided to be paid under the terms of said contract by this corporation, now, therefore, be it resolved that the action of the president and secretary of this corporation in executing and delivering said contract be and the same is hereby ratified, approved, and confirmed.

“Be it further resolved that the execution and delivery of said contract by the president and the secretary of this corporation be and the same is hereby declared to be the [115] corporate act and deed of this company, and binding upon it.

“The assistant secretary stated the company had received letters from Mr. F. A. Gillespie

(Testimony of Ruth Reynolds.)

in reference to interest in certain lands and in reference to certificates for 23,800 shares of the capital stock of the Gillespie Land & Irrigation Company, and in reference to other stocks and bonds, and had also received special warranty deeds conveying certain lands in the city of Tulsa, which deeds were signed by F. A. Gillespie and Maud Gillespie, for the purpose of carrying out the obligations of F. A. Gillespie under the terms of the contract.

“And it appearing to the directors that said F. A. Gillespie has heretofore delivered and transferred to the corporation all other property mentioned in the contract of May 15, 1929, the following resolution was offered and, on motion, unanimously adopted:

“Resolved that the company accept the above referred to letters and deeds from F. A. Gillespie, which together with the stocks and bonds and other securities heretofore transferred and delivered to this corporation by the said F. A. Gillespie, are in full compliance with the obligations of F. A. Gillespie to be performed under the terms of the contract dated May 15, 1929, and the company acknowledges receipt in full of all of the property referred to in said contract and therein conveyed and assigned or to be conveyed [116] and assigned by the said F. A. Gillespie.

(Testimony of Ruth Reynolds.)

“On motion made, seconded, and carried, the secretary was instructed to incorporate in this minute book immediately following minutes of this meeting copies of the above referred to letters.”

The Member: What is this, now?

Mr. Rorschach: The minutes ratifying or approving the contracts here in question.

The Member: What is this following?

Mr. Rorschach: This is the ratification of that contract. This whole meeting has to do with the ratification of that agreement.

The Member: That should have been offered as an exhibit instead of going into the record.

Mr. Anderson: I will stipulate that F. A. Gillespie & Sons ratified this contract, in order to save time.

Mr. Rorschach: I want the entire minutes to go in. If you want to stipulate them, we will furnish a copy of the minutes.

The Member: I do not like to have to put all of this in the record. It would be in the record just the same if it were an exhibit.

Go ahead and read it.

The Witness (Continuing):

“The matter of the litigation between Maud Gillespie, F. A. Gillespie, and [117] F. A. Gillespie & Sons Company now pending in the District Court of Tulsa County, Oklahoma.

(Testimony of Ruth Reynolds.)

was then discussed. The president stated a compromise settlement had been effected with the plaintiff whereby it was agreed that Maud Gillespie was indebted to the company in the sum of \$17,845.05, less an amount consisting of payments maturing and actually paid by Mrs. Gillespie, taxes, interest, and so forth, since May 15, 1929, on the so-called Santa Monica properties, which amount had not as yet been definitely determined, and that, under the terms of the agreement, this amount was to be determined and to be deducted from the above sum of \$17,845.05, and that one-half of that amount was then to be paid to Mrs. Gillespie by the company out of the payment of \$10,000 which would become due from the company to Mrs. Gillespie on May 15, 1932, or the company could deduct that amount from that company.

“The company, it was agreed and admitted, had owed Mrs. Gillespie, on account of monthly payments, the sum of \$10,000, and that under an order of Court Mrs. Gillespie had received \$2,000, and her attorney had received \$2,000, making a total of \$4,000, leaving a balance of \$6,000 due Mrs. Gillespie on account of monthly payments provided under the contract, and this sum of \$6,000 was to be immediately paid to Mrs. Gillespie, and that Maud Gillespie was to acknowledge in writing that she held such interest in the Santa Monica property as

(Testimony of Ruth Reynolds.)

she held on May 15, 1929, as trustee for this [118] company, and that she would at any time, upon request of the company, transfer and convey the same to such person or persons as the company might nominate, the consideration for the transfer, of course, to be paid to this company.

“All of the directors at the meeting expressed themselves as being fully advised of the proposed compromise settlement.

“The following resolution was offered and, on motion, unanimously adopted:

“Resolved: That the proposed compromise settlement with Maud Gillespie in the litigation now pending in the District Court of Tulsa, County, Oklahoma, as outlined by the president’s statement, be and the same is hereby ratified, approved, and confirmed, and the proper officers of this corporation are directed to pay Maud Gillespie the sum of \$6,000 immediately upon the approved journal entries of judgment having been filed by the Judge.

“There being no further business, the meeting, on motion, adjourned.

“Signed F. A. GILLESPIE,

President.

PEARL KIMBLE,

Secretary.

“Approved by P. A. Gillespie.”

(Testimony of Ruth Reynolds.)

Q. Will you again refer to your minute books and ascertain if you have a letter as to the contract of Maud Gillespie?

The Member: How long is that? [119]

Mr. Rorschach: I am going to offer this in evidence, Your Honor.

This is part of the minutes, Your Honor. Would it be permissible to submit a photostatic copy of this?

The Member: Yes. There is no objection to the photostatic copy, is there?

Mr. Anderson: No objection, Your Honor.

The Member: Admitted as petitioner's exhibit No. 1.

(The said letter, so offered and received in evidence, was marked "Petitioner's Exhibit No. 1" and made a part of this record.)

PETITIONER'S EXHIBIT NO. 1

Tulsa, Oklahoma

November 16, 1933

F. A. Gillespie and Sons Company

Tulsa, Oklahoma

Gentlemen:

Under the terms of a certain Agreement entered into under date of May 15, 1929, between F. A. Gillespie, F. A. Gillespie and Sons Company and myself, the company is obligated to pay me a cash dividend of \$10,000.00 per year—or in lieu of a declared dividend, to pay me an equal sum in cash.

(Testimony of Ruth Reynolds.)

Since I realize the company is not at this time financially able to continue these payments, I offer you the following proposition.

I agree to allow suspension of such dividend payment of \$10,000.00 per year, to be resumed upon the company becoming financially able to resume payment, provided F. A. Gillespie will suspend a like amount from funds he now draws from the company; such suspended funds to be used for the development of the company. Provided further, that F. A. Gillespie pay to me one-half of the net refund on federal taxes received by him in December, 1932 (by net refund, meaning total amount received, less payments made in settlement of suit and for fees and commissions).

My agreement of suspension of dividend payments is contingent primarily upon receipt of this money from F. A. Gillespie. I am the owner of a building in Los Angeles that has a second mortgage of approximately \$15,000.00 which has to be reduced at the rate of approximately \$2,500.00 semi-annually. There is also a first mortgage of \$75,000.00 on the building. If I receive funds referred to from F. A. Gillespie, the second mortgage will be paid in full and the income from the property will then take care of interest and principal payments on the first mortgage, thus enabling me to allow suspension of dividend payments from the company.

This letter is not to be construed to imply that I am waiving my right for all time to future divi-

(Testimony of Ruth Reynolds.)

dends and after three years, if I should so wish, I may demand these payments be continued as set out in the original contract.

Trusting this proposition will prove acceptable to the parties concerned, I am

Very truly yours,
MAUD GILLESPIE.

[131]

By Mr. Rorschach:

Q. Now, will you refer to the books and records you have with you and tell the member of this board the amount which has been paid to F. A. Gillespie for the year 1929, down to December 31, 1935, under the terms of the agreement of May 15, 1929, attached to petitioner's petition as exhibit D?

Mr. Anderson: Objected to as immaterial.

Mr. Rorschach: I think that is material for the reason that we allege in our petition the amount of money that has been paid under the terms of this contract, and if this is termed a taxable asset that is material.

The Member: Objection overruled.

Mr. Anderson: Exception. [120]

The Member: Exception allowed.

Is that some more minutes you are going to read?

Mr. Rorschach: No.

The Witness: The records of the company, of which I have a condensation here, show that in 1932 there passed through F. A. Gillespie's account the total sum of \$39,375. Of that amount——

(Testimony of Ruth Reynolds.)

Mr. Anderson (Interrupting): Just a minute. Where are those figures taken from?

Mr. Rorschach: Just a minute Mr. Anderson.

Just proceed with the reading of your information there.

Mr. Anderson: Just a minute. I want to see where this information comes from. These are sheets of paper.

Mr. Rorschach: She is testifying from the books and records of the company.

By Mr. Anderson:

Q. Are these sheets part of the books and records?

A. These sheets are in my handwriting and represent a condensation of the books and records of the company.

By Mr. Rorschach:

Q. Those are from the books and records you have here in your possession? A. Yes, sir.

Mr. Anderson: I would like to see the books. The books are the best evidence. [121]

Mr. Rorschach: Your Honor, we have the books here.

The Member: Well, show them to him.

The Witness: This (referring to books) is the account of 1932, of F. A. Gillespie, which has an opening entry of a credit, which is substantiated by this audit report, unpaid salary due from F. A. Gillespie & Sons Company to F. A. Gillespie—

Mr. Anderson (Interrupting): Just a minute. The only thing I am interested in is the payments made by Gillespie & Sons to Mr. Gillespie pursuant to this contract.

The Witness: In 1932 his account was adjusted for the years 1929, 1930, and 1931, which this account represents. Then, in the year 1932, 1933, 1934, and 1935 he was paid \$15,000 a year under the contract, with the exception of this account (indicating), and I can explain the addition there.

But this account in 1932 represents, necessarily, adjustments made in previous years not paid for.

By Mr. Anderson:

Q. How much, actually, was he paid in 1932?

A. He was actually paid an amount of \$39,375, under the contract.

Q. Does that represent adjustments made of payments—That includes payments that were not made in prior years?

A. That represents amounts paid to him, under this contract, for the year 1929, after May 15, and for the years [122] 1930 and 1931.

Q. What do the figures on this sheet represent? Do they represent the payments actually made to Mr. and Mrs. Gillespie?

A. Just to Mr. Gillespie.

Q. Do they represent the net payments made after adjustments were made?

A. The figures I have represent the net payments to Mr. F. A. Gillespie, under the terms of the contract.

(Testimony of Ruth Reynolds.)

Q. And those figures are taken from the books?

A. That is right.

Mr. Anderson: I have no objection to your testifying to them.

By Mr. Rorschach:

Q. Then Miss Reynolds, will you state the amounts of money paid by F. A. Gillespie & Sons Company to F. A. Gillespie from the year 1929 to December 31, 1935, under the terms of this agreement of May 15, 1929, which is attached to the petitioner's petition as exhibit D.?

A. In the year 1932 Mr. F. A. Gillespie was paid \$39,375, which represented the amounts due him under the contract——

Mr. Anderson (Interrupting): Just a minute. The contract speaks for itself. I move that the answer be stricken and limited to amounts actually paid. [123]

Mr. Rorschach: That is what she is trying to testify to. You have interrupted her so many times——

By Mr. Rorschach:

Q. Under that contract this amount of money was paid?

Mr. Anderson: He was entitled to receive an annuity of \$15,000, under the contract; is that right?

Mr. Rorschach: I am asking Miss Reynolds to testify to what the company paid.

(Testimony of Ruth Reynolds.)

The Member: The objection interposed was to the statement that the money was paid under the contract.

By Mr. Rorschach:

Q. Will you state, Miss Reynolds, what the company paid to Mr. F. A. Gillespie in 1932 by virtue of the terms of the contract of May 15, 1929?

Mr. Anderson: Now, I'll object to that, if the answer is going to be the same.

The Member: Was anything paid to him except by virtue of the contract?

Mr. Rorschach: Your Honor, there were other payments made to him in the year 1939 by virtue of the amount he was entitled to for the year 1932.

Mr. Anderson: Well, let the witness explain what these other payments represent, then.

Mr. Rorschach: Well, we will have to let the witness testify, then. [124]

The Member: I will overrule the objection.

Go ahead.

The Witness: In the year 1932 Mr. F. A. Gillespie was paid \$39,375. That amount represented \$9,375 due for the year 1929, \$15,000 due him for the year 1930, and \$15,000 due him for the year 1931. Also, in the year 1932 he was paid \$15,000, for the year 1932; and then, was paid \$15,000 for each of the years, 1933, 1934, and 1935.

By Mr. Rorschach:

Q. Now, will you refer to the books and records and tell the Member of this Board the amount paid

(Testimony of Ruth Reynolds.)

to Maud Gillespie from the year 1929 to December 31, 1939, under the terms of the agreement of May 15, 1929, which is attached to petitioner's petition as exhibit D?

A. In 1932 Mrs. Maud Gillespie received the sum of \$19,500. She also received an additional sum of \$15,394.01. Those were adjustments on the amounts due her from the time the contract was made, in May, 1929, for the balance of 1929, and for 1930 and 1931.

In 1933 she was paid \$25,000.

In 1934 she was paid \$20,000; \$15,000 under the contract, and \$5,000 which was an adjustment on the 1932 payment.

In 1935 she received \$17,666.25. \$15,000 of that was paid on the contract, and \$2,666.25 was in the nature of a [125] loan to Mrs. Gillespie to pay off some obligation.

In 1936 she received \$19,000, of which \$15,000 was payment under the contract, and \$4,000 was a loan to retire an obligation.

In 1937 she received \$15,000.

In 1938 she received \$15,000.

In 1939 she received \$15,000.

Q. As assistant secretary of the company do you have custody of the stock book of F. A. Gillespie & Sons Company? A. Yes, sir.

Q. Will you refer to that stock book and state the stockholders to whom the stock of F. A. Gillespie & Sons Company was issued and outstanding,

(Testimony of Ruth Reynolds.)

and the amounts issued and outstanding, as of May 15, 1929?

A. There were 13 stock certificates of F. A. Gillespie & Sons Company that might be issued.

No. 1 is canceled. No. 2 was issued to Maud Gillespie for 5 shares. No. 3 was issued to B. A. Gillespie for 5 shares. No. 4 was issued to L. A. Gillespie for 5 shares. No. 5 was canceled. No. 6 was issued to F. A. Gillespie for 5 shares. Nos. 7, 8, 9, 10, and 11 were canceled. No. 12 was issued to F. A. Gillespie, Trustee for F. A. Gillespie, Maud Gillespie, B. A. Gillespie, L. A. Gillespie, P. A. Gillespie, for 9,975 shares.

Certificate No. 13 was issued to P. A. Gillespie for [126] 5 shares.

Making a total number of shares outstanding of 10,000.

Q. I now hand you exhibit B, attached to petitioner's petition, being a declaration of trust, dated February 9, 1921, and ask you if the stock issued in the name of F. A. Gillespie, Trustee, in the amount of 9,975 shares is the stock held by F. A. Gillespie under said declaration of trust? A. It is.

Mr. Rorschach: I have here the articles of incorporation of F. A. Gillespie & Sons Company, of Tulsa, Okla., certified by the Secretary of State of the State of Oklahoma, which I desire to offer in evidence at this time.

Mr. Anderson: No objection.

(Testimony of Ruth Reynolds.)

The Member: Admitted as petitioner's exhibit No. 2.

(The said articles of incorporation, so offered and received in evidence, were marked "Petitioner's Exhibit No. 2" and made a part of this record.)

PETITIONER'S EXHIBIT NO. 2

State of Oklahoma

Great Seal of the State of Oklahoma

1907

Office of Secretary of State

To all to whom these Presents Shall Come, Greeting:

I, C. C. Childers, Secretary of State of the State of Oklahoma, do hereby certify that the following and hereto attached is a true copy of Amended & Extended Articles of Incorporation of F. A. Gillespie and Sons Company, Tulsa, Oklahoma.

Filed: November 6, 1939, the original of which is now on file and a matter of record in this office.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Oklahoma City, this sixth day of November, A. D. 1939.

[Seal]

C. C. CHILDERS

Secretary of State

KATHERINE MANTON

Ass't Secretary of State.

(Testimony of Ruth Reynolds.)

AMENDED ARTICLES OF INCORPORATION
OF

F. A. GILLESPIE AND SONS COMPANY

Know All Men by These Presents:

That the undersigned, citizens of the State of Oklahoma, do hereby voluntarily associate ourselves together for the purpose of forming a private corporation under the Laws of the State of Oklahoma, and do hereby certify:

I.

That the name of this Corporation shall be F. A. Gillespie and Sons Company.

II.

That the objects and purposes for which this Corporation is formed are as follows:

To locate, purchase, lease or otherwise acquire, and sell lease and otherwise dispose of, lands containing, or believed to contain, or possibly containing, oil, gas, coal or other minerals, and all real estate necessary for the purposes of this Corporation, and to mortgage, sell and otherwise dispose of such real estate, leases or interests therein; to prospect for, and mine oil, gas, coal and other minerals; to contract for the drilling of oil and gas wells, and the digging and mining of coal and all other mining lands and property; to drill, bore, or otherwise develop and maintain oil, gas, coal and other mineral

(Testimony of Ruth Reynolds.)

property or properties, and to buy, own, lay, construct, maintain, operate or sell, lease or otherwise dispose of buildings, tanks, pipe lines, machinery, equipment, tools, reservoirs, refineries, smelters, crushers and mills necessary for the production, preservation, refining, manufacture, smelting, milling, [134] marketing and distribution of oil, gas, coal or other minerals and the products and by-products thereof; to do all kinds of mining and manufacturing, distributing of goods, wares and merchandise by land and water in any manner; to buy, sell and improve lands, as permitted by law; to build houses, structures, vessels, cars, wharves, docks, and piers; to lay, equip and construct and maintain pipe lines; to erect and operate telegraph and telephone lines and lines for conducting electricity in connection with the business of this Corporation; to own, buy, sell, lease and otherwise dispose of, maintain and operate filling and distributing stations, both in and out of the State of Oklahoma, and to retail and deal generally in oil and gas, coal and other minerals, and the products and by-products thereof; to enter into and carry out contracts of every kind pertaining to its business; to acquire, use, sell and grant licenses upon patent rights, and to buy, own, hold, sell and otherwise dispose of such patent rights.

To refine, market and distribute crude oil or petroleum and all of its products and by-products; to lease or otherwise acquire and sell, lease or mort-

(Testimony of Ruth Reynolds.)

gage or otherwise dispose of developed or producing oil and gas properties and the products of such oil and gas properties; to purchase, produce, refine, sell and distribute petroleum and all of the products and by-products thereof; to buy, sell or otherwise dispose of and manufacture all kinds of illuminating, burning and heating oils and gasoline, naphtha, lubricants, greases, waxes, and all other products and by-products of petroleum, and to act as agent or broker for others in all said acts.

To carry on the business of storing, drilling or prospecting for mining, producing, piping, buying and selling petroleum, natural and artificial gas, casing head gasoline, naphtha, and any and all other products or by-products thereof.

To build, construct, equip, maintain, own, control, lease or otherwise acquire, sell and dispose of, and operate [135] all necessary tanks, tank cars, pipes and pipe lines, compressors, separating plants, refineries, buildings, warehouses and the necessary fixtures and equipment thereunto belonging, and other and all means of refining, storing, saving, conveying, transporting, exporting, or marketing petroleum, oil and gas, or the crude or refined products of either, and to do all things necessary as a broker or agent in the marketing or sale of the products or by-products thereof.

To contract for, build, buy, own, lease, sell and operate all necessary mills, smelters, roads, railroads, spur tracks, tramways, loading racks, ditches,

(Testimony of Ruth Reynolds.)

flumes, pumps, pumping plants, of any kind or kinds whatsoever, and especially casing head gas plants and compressors, for the purpose of converting casing head gas into gasoline and other products, and such other property as shall be fit and necessary in carrying out the objects herein stated.

To search for, prospect and explore for ores and minerals of all kinds and character and locate mining claims, grants or lodes in the United States of America or the territories thereof, or in foreign countries, and acquire, own, work, lease, mortgage, sell and dispose of any mines, mining rights and metalliferous lands and any interest therein, and to explore work and develop the same.

To mine, quarry, work and develop mining and mineral rights; to crush, concentrate, smelt, calcine, refine, dress, amalgamate and prepare for market ores, metals and mineral substances of all kinds, and to do all other acts and things necessary or conducive to the corporations's objects, including the erection of buildings or works, and the installing of machinery and appliances of every description whenever necessary, expedient or desirable; to mortgage any mining grants, claims or lodes, mining and mineral rights, or other property belonging to this corporation and to issue bonds of the corporation whenever it may be determined so to do. [136]

To buy, sell, deal in ores and mineral plants, machinery, tools, implements, *gorceries*, provisions, clothing, boots and shoes, furnishing articles, hard-

(Testimony of Ruth Reynolds.)

ware, wooden and metallic ware, and all other articles and things in any wise required or capable of being used in connection with mining operations, and to make and manufacture such articles when required.

To construct, carry out, maintain, improve, equip, manage control or superintend any roads, ways, private railways, (private tramways, bridges, reservoirs, water courses, aqueducts, wharves) piers, docks, bulk heads, furnaces, mills, crushing, concentrating and smelting works, hydraulic works, factories, dwelling houses and warehouses; to purchase vessels and other means of transportation, except railroads other than private railroads and equip and operate the same as required for the uses and purposes of the Company, and also to do any and all other acts and things relating to mining.

To buy, purchase, lease, or otherwise acquire or build, construct, maintain and operate electric light, power and gas plants and water works, or either of them, and to build plants, lay the pipes, erect poles and construct lines, and to acquire, own, hold and sell and dispose of any and all lands and property, plants, buildings and appurtenances thereunto belonging and necessary therefor, and to do all things necessary to carry out these purposes and objects.

To acquire, so far as consistent with the Constitution and Laws of the State of Oklahoma, by purchase, subscription or otherwise, and to hold as in-

(Testimony of Ruth Reynolds.)

vestment or otherwise, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of Oklahoma, or any other State, district, Territory or Country, and to sell, assign, transfer, mortgage, pledge or otherwise dispose of the same, and, while the owner thereof, to exercise all the rights, powers and privileges of ownership. [137]

To aid in any lawful manner any corporation or association of which the bonds or other securities or evidences of indebtedness or stock are held by the Company, and to do any and all lawful acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

To acquire, own, sell or otherwise dispose of and deal in bonds, mortgages, securities, notes, commercial paper of corporations and individuals; to acquire, buy, own, sell and otherwise dispose of and deal in bonds, debentures, certificates of indebtedness and all manner and form of securities of the United States of America, of the various States of the United States of America and of the municipal sub-divisions thereof, and of all other Territories and Countries, and in any real, personal and mixed property of whatsoever kind and character permitted by the Laws of this State and of any State in which this corporation shall qualify to do business.

(Testimony of Ruth Reynolds.)

To manufacture, purchase or acquire, in any lawful manner, and to hold, own, mortgage, pledge, sell, transfer, or in any manner dispose of and deal and trade in goods, wares, merchandise and property of any and every class and description, and in any **part of the world.**

To acquire the good will, rights and property and to undertake the whole or any part of the assets or liabilities of any person, firm, association or corporation; to pay for the same in cash, the stock of this corporation, bonds or otherwise; to hold, or in any manner to dispose of the whole or any part of the property so purchased; to conduct in any lawful manner the whole or any part of any business so acquired and to exercise all the powers necessary or convenient in and about the conduct and management of such business.

To apply for, purchase or in any manner to acquire, and to hold, own, use, and operate, or to sell or in any manner dispose of, and to grant, license or otherwise give, rights in [138] respect of and in any manner deal with any and all rights, inventions, improvements, and processes used in connection with or secured under letters patent or copyrights of the United States, or any other Country, or otherwise, and to carry on any business, manufacturing or otherwise, which may be deemed to directly or indirectly effectuate these objects or any of them, in connection with the business or businesses transacted and carried on by this corporation.

(Testimony of Ruth Reynolds.)

Subject to, and not inconsistent with, the Constitution and Laws of the State of Oklahoma, to guarantee, purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock or any bonds, securities or evidences of indebtedness issued or created by any other corporation or corporations of this State, or any other State, Country, Nation or Government, and while owner of said stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon to the same extent as natural persons might or could do in connection with its said business or businesses and of any Company in a business in connection therewith.

To enter into, make and perform contracts of every kind with any person, firm, association, or corporation, municipality, body politic, Company, Territory, Government, or colony or dependency thereof, and without limit as to amount, to draw, make, accept and endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warranty bonds, debentures and other negotiable instruments and evidences of indebtedness, whether secured by mortgage or otherwise, as well as to secure the same by mortgage or otherwise, so far as may be permitted by the Laws of the State of Oklahoma.

To purchase or otherwise acquire, hold and re-issue the shares of its capital stock subject to the provisions of the Laws of the State of Oklahoma.

To do any and all things herein set forth to the same extent as natural persons might or could do, and in any part of [139] the world, as principals, agents, contractors, trustees or otherwise and either alone or in company with other persons, firms, companies, associations and corporations.

III.

That the place where its principal business is to be transacted is at the City of Tulsa, State of Oklahoma, and in such other places in the State of Oklahoma and other States and Countries as the Directors may, from time to time determine, and the meetings of the Stockholders and Directors may be held at such branch office or offices thus established.

IV.

That the term for which this corporation is to exist is twenty (20) years from October 25, 1939.

V.

(a) The number of Directors of this corporation shall be three (3). The names and addresses of such of them as are now Directors and who will serve until the next election of Directors (their qualifications being that two of them are citizens and residents of the State of Oklahoma, and all and each of them are owners of capital stock of this corporation) are as follows:

(Testimony of Ruth Reynolds.)

Name	Residence
F. A. Gillespie	Tishomingo, Oklahoma
P. A. Gillespie	Tulsa, Oklahoma
L. A. Gillespie	Houston, Texas

(b) The names and addresses of the officers who are to serve until the next election of such officers are as follows:

Office Held	Name	Residence
President	F. A. Gillespie	Tishomingo, Oklahoma
Vice President	P. A. Gillespie	Tulsa, Oklahoma
Vice President	L. A. Gillespie	Houston, Texas
Secretary	B. A. Gillespie	Gila Bend, Arizona

VI.

That the amount of the authorized Capital Stock of this Corporation shall be One Million Dollars (\$1,000,000.00), and [140] shall be divided into Ten Thousand (10,000) shares of One Hundred Dollars (\$100.00) each.

This Certificate or Charter herein granted is issued subject to the following Constitutional requirement: That the Corporation to which it is issued will submit any differences it may have with its employees in reference to labor, to arbitration, as shall be provided by law.

In Witness Whereof, we, and each of us, have hereunto subscribed our names this the 25th day of October, 1939.

(Testimony of Ruth Reynolds.)

Directors

(Signed) F. A. GILLESPIE

(Signed) P. A. GILLESPIE

(Signed) L. A. GILLESPIE

Officers

(Signed) F. A. GILLESPIE

President

(Signed) P. A. GILLESPIE

Vice President

(Signed) L. A. GILLESPIE

Vice President

(Signed) B. A. GILLESPIE

Secretary [141]

State of Oklahoma

County of Tulsa—ss.

Before me, Ruth Reynolds, a Notary Public in and for said County and State, on this the 25th day of October, A. D. 1939, personally appeared F. A. Gillespie, P. A. Gillespie, L. A. Gillespie and B. A. Gillespie, to me known to be the identical and same persons who executed the within and foregoing instrument, in writing, and each for himself, acknowledged that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

[Seal] (Signed) RUTH REYNOLDS

Notary Public

My commission expires April 14, 1942. [142]

(Testimony of Ruth Reynolds.)

SECRETARY'S MEMORANDUM

Oklahoma City, State of Oklahoma
Secretary's Office

This instrument was filed for record this 6th day
of Nov. A. D. 1939 at 9 o'clock A. M.

Recorded in Corporation Record No..... at
page

C. C. CHILDERS

Secretary of State

By M. P.

\$105.00

6.00 2 C. C.

\$111.00

Del. to H. E. Rorschach, Natl. Bank of Commerce,
Tulsa, Oklo. [143]

By Mr. Rorschach:

Q. I hand you petitioner's exhibit No. 1 and
ask you to identify that, please.

A. That is a letter written by Maud Gillespie to
F. A. Gillespie & Sons Company, under date of No-
vember 16, 1933, by which she amended the pay-
ments due her under the contract of May 15, 1939.

[127]

Q. Where did that letter come from with respect
to your records?

(Testimony of Ruth Reynolds.)

A. This is a part of the minutes of the corporation.

Mr. Rorschach: That is all.

Cross-Examination

By Mr. Anderson;

Q. You stated on direct examination that Mrs. Gillespie received from Gillespie & Sons \$17,666.25 during 1935, the year at issue here, of which amount \$2,666.25 represented a loan. Does the corporation's records disclose that this amount is a loan outstanding? In other words, is it listed as a loan receivable or an account receivable on the corporation's books? A. It is not.

Q. What is the basis for your statement that this amount was a loan?

A. The information given me by Mr. P. A. Gillespie at the time the money was advanced.

Q. Who was P. A. Gillespie?

A. P. A. Gillespie is vice president, under whom I work.

Q. What did he tell you?

A. He told me Mrs. Gillespie had a note in the amount of \$2,500, and interest of \$166.25, which had to be met, and she desired the company to advance the money to pay [128] that in the nature of a loan.

Q. The corporation has no record on its books that this was a loan?

A. Except a notation in their ledger.

Q. Who made that notation? A. I did.

(Testimony of Ruth Reynolds.)

Q. Pursuant to Mr. Gillespie's instructions?

A. Yes.

Q. Did Mrs. Gillespie give a note for that loan?

A. No.

Q. Or any security? A. No.

Q. Did it provide for any interest?

A. No, sir.

Q. Did she ever pay any interest?

A. No, sir.

Q. Has the loan ever been repaid?

A. No, sir.

Q. Up to this time?

A. Not to this time.

Mr. Anderson: That is all.

Mr. Rorschach: That is all.

Witness Excused

Mr. Rorschach: Now, Your Honor, at this time we ask leave to file an amendment to our petition to conform to [129] the proof.

In the petition, I might state, for Your Honor's information, and for the benefit of Mr. Anderson, we have merely amended the amount of money alleged to have been received by Maud Gillespie up to the year 1935 to conform to the amount proved at this hearing.

Mr. Anderson: There is no objection to the amendment, Your Honor. The record shows what was actually paid.

The Member: The motion to amend is granted.

Mr. Rorschach: I don't believe that concludes the evidence, in so far as the petitioner is concerned.

The Member: Petitioner rests.

Mr. Anderson: Respondent rests, Your Honor.

The Member: The proceedings are closed, with the submission of evidence.

You may have 45 days for simultaneous briefs, and 15 days for reply briefs.

(Hearing Concluded)

[Endorsed]: U.S.B.T.A. Filed June 4, 1940.

[130]

[Title of Board and Cause.]

Docket No. 98770. Promulgated January 22, 1941.

Petitioner on May 15, 1929, agreed to transfer certain properties to the F. A. Gillespie & Sons Co., the capital stock of which was held in trust for herself, her husband, and their sons for the period of their lives, with remainder to petitioner's grandchildren. As part consideration the transferee company agreed to pay petitioner two annuities totaling \$25,000 annually. Held, the cost basis of the annuities to be used in computing the tax due under section 22 (b) (2) of the Revenue Act of 1934 is the cost of these annuities from a reputable insurance company and not the value of the transferred properties, which was in excess

of that cost. F. A. Gillespie, 38 B. T. A. 673, distinguished.

Harold E. Rorschach, Esq., for the petitioner.

Stanley B. Anderson, Esq., for the respondent.

The respondent has determined a deficiency in income tax for the calendar year 1935 in the amount of \$1,476.55, which results from his inclusion in petitioner's income of the sum of \$17,666.25 received by petitioner during the taxable year from F. A. Gillespie & Sons Co.

Questions presented are (1) whether the whole sum of \$17,666.25 should be excluded from income as a return of capital to petitioner; (2) whether that whole sum may be included in petitioner's income under section 22 (b) (2) of the Revenue Act of 1934 as an annuity and, if so, whether that section so applied is unconstitutional; (3) whether only that portion of \$17,666.25 which is not in excess of 3 percent of the fair cost on May 15, 1929, of an annuity which would produce \$25,000 annually may be included in petitioner's income; and (4) whether \$2,666.25 of the \$17,666.25 must be excluded from petitioner's income in any event as the proceeds of a loan.

Certain of the facts involved have been stipulated and are so adopted as our findings. The material portion of them is set out hereinafter with our other findings.

FINDINGS OF FACT.

Petitioner is an individual, residing at 712 North Roxbury Drive, Beverly Hills, California. She was born on June 9, 1872, and was [144] married to Frank A. Gillespie, born August 27, 1868, in 1892. They had three sons, B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, and six grandchildren.

On April 4, 1920, F. A. Gillespie & Sons Co., a corporation, hereinafter called the company, was organized under the laws of Oklahoma, with a capital stock of \$1,000,000, divided into 10,000 shares of the par value of \$100 each. The shares were issued 9,980 to F. A. Gillespie and 5 each to petitioner and B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie. By an instrument executed on February 9, 1921, F. A. Gillespie, in consideration of the fact that equitable title to some of the properties transferred to the company for the issuance of its stock to him had theretofore been conveyed to petitioner and B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, thereby declared that he held 9,975 of the shares of the company in trust in equal shares for the four named individuals and F. A. Gillespie. The trust term was limited to the life of the last surviving beneficiary and the corpus was made distributable among the surviving children or grandchildren of petitioner and F. A. Gillespie or among their heirs. The beneficiaries were entitled to receive currently all dividends paid on the stock and accretions thereto. On

the death of petitioner or F. A. Gillespie within the trust period, the surviving children were to become entitled to the current distributions and on their death similarly within the term of the trust this right was to pass to the grandchildren. The trustee was given broad powers of management and investment, and surviving trustees were designated.

Petitioner and F. A. Gillespie on May 15, 1929, entered into two agreements by the first of which, after reciting that they were living separate and apart and wished to settle their rights in their properties, they agreed mutually on the disposition of the property which they owned jointly and released each other reciprocally of all claims for support or inheritance. With the exception of certain personal and real property which was set aside for the contractors individually, the bulk of the property, it was agreed, was to be conveyed to the F. A. Gillespie & Sons Co. By the terms of the second agreement, which was executed by petitioner, F. A. Gillespie, and the company, the two first named conveyed to the company the following property, of the values indicated, which they owned jointly:

	Value
U. S. First Liberty Loan bonds and Port of New Orleans, Louisiana, state bonds.....	\$1,172,000.00
Empress Building, Tulsa, Oklahoma.....	150,000.00
Sundry lands and lots located in Oklahoma.....	22,512.00
Cash and accounts receivable.....	94,365.22
Sundry stocks	25,363.00
Total.....	1,464,240.22

The cost of the above property to F. A. Gillespie and petitioner equaled or exceeded the above fair market value.

As part consideration for the conveyance of these properties the company agreed to pay to F. A. Gillespie and petitioner, each respectively, the sum of \$15,000 per year for life and guaranteed to petitioner, in addition, that she should receive annually as dividends an amount equal at least to \$10,000. If funds were not available for the declaration of dividends in this amount, the company agreed to pay such sum to the petitioner. F. A. Gillespie agreed in addition that he would not sell any of the shares of the company which he held in trust without the consent of a majority of the company's directors.

The conveyances of property by petitioner to F. A. Gillespie & Sons Co. in accordance with such tripartite agreement were made for two purposes, namely, first, as a purchase of the specified annuity to herself during her life, to the extent of the fair cost thereof, and, secondly, as a gift of the excess of the value of such properties over such cost for the benefit of her children and grandchildren.

At a meeting of the board of directors of the company duly called on February 18, 1932, the contract executed by the company on May 15, 1929, under which the parties had been acting, was adopted and ratified in view of the fact that "the

acquisition by this Company of the properties and assets referred to in said contract are [sic] of great value and largely in excess of the amounts provided to be paid under the terms of said contract by this corporation." It was acknowledged by further resolution of the directors that the company had received all the properties agreed to be transferred to it under the contract.

On the same date, February 18, 1932, deeds transferring the realty identified above as the Empress Building, and the Gillespie residence in Tulsa, included above in sundry Oklahoma lands, were executed to the company. A final deed covering lands agreed to be conveyed in Oklahoma was executed on June 25, 1934.

During the year 1932 petitioner and the company became involved in certain litigation in which the company asserted a claim for debt against petitioner in the amount of \$17,845.05. This controversy was settled by the petitioner's agreement to pay the company one-half of this claim, less certain minor deductions, out of the \$10,000 which should become due to her from the company on May 15, 1932, and by the transfer to the company of certain realty in Santa Monica, California, owned by petitioner. The company agreed to pay to petitioner at once \$10,000 owed by it under the contract less \$2,000 for attorney's fees and \$2,000 already paid to petitioner.

[146]

On June 22, 1932, certain lots of real property of undetermined value owned by petitioner and lo-

cated in Santa Monica, California, were transferred to the company.

Petitioner, on November 16, 1933, in view of the depleted financial condition of the company, agreed to the suspension of the dividend payments of \$10,000 annually for three years or for such shorter period as the company was unable to make them. This agreement was made contingent on the suspension by F. A. Gillespie of his right to receive \$10,000 annually from the company, the funds thereby freed to be used in building up the concern. It was also made contingent on the payment to petitioner of one-half of the "net refund on Federal taxes" received by F. A. Gillespie in December 1932. It was stated that petitioner owned a building in Los Angeles, a \$15,000 second mortgage on which she was obligated to discharge at the rate of \$2,500 annually, and that the funds to be received from F. A. Gillespie were to be applied on this obligation.

The following payments were made under the agreement of May 15, 1929, by the company to petitioner and F. A. Gillespie on the dates indicated:

	Petitioner	Gillespie
1932.....	\$34,894.01	\$54,375
1933.....	25,000.00	15,000
1934.....	20,000.00	15,000
1935.....	17,666.25	.....
1936.....	19,000.00	.....
1937.....	15,000.00	.....
1938.....	15,000.00	.....
1939.....	15,000.00	.....

Of the amounts paid in 1932, \$15,394.01 received by petitioner and \$39,375 received by F. A. Gillespie represent adjustments of amounts remaining due under the contract for the years 1929, 1930, and 1931.

Of the amount received by petitioner during 1935, the taxable year, \$2,666.25 is noted on the books of the company as a loan. However, petitioner did not sign a note nor give security for this amount. No interest was agreed on and up to the time of the hearing in this proceeding no payment of principal or interest had been made.

An annuity upon the life of a male individual born in the United States on August 22, 1868, which would have paid \$15,000 per annum to him for his life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, for the sum of \$153,750.

An annuity upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$15,000 per annum to her for her life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, for the sum of \$196,537.50. An annuity upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$20,000 per annum to her for her life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929,

for the sum of \$262,050. An annuity upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$25,000 per annum to her for her life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, for the sum of \$327,562.50.

OPINION.

Hill: The substantial question which we are called on to decide here is the nature of the contract entered into between petitioner and F. A. Gillespie and the company on May 15, 1929. The petitioner argues initially (1) that it constituted a sale of the properties transferred, with payment to be made in annual installments, and the annual payments, therefore, constituting a return of capital, may not be taxed as income. (2) It is contended in the alternative that if the amounts agreed under the contract to be paid to petitioner are considered annuities, their taxation under section 22 (b) (2) of the Revenue Act of 1934,¹ is unconstitutional, since the stat-

¹Sec. 22. Gross Income.

* * * * * *

(b) Exclusions From Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * *

(2) Annuities, Etc.—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a

ute, in making an arbitrary division between return of capital and income, taxes the former as income. This result, it is contended, is beyond the limits of the power conferred by the Sixteenth Amendment. (3) Petitioner argues further that, if the amounts in question are held taxable as annuities, the cost basis to be used in applying section 22 (b) (2), *supra*, must be only the cost from a reputable insurance company of the annuity payable to the petitioner. It is agreed by both parties that the petitioner was the owner of one-half the properties

life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this title or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premium and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph.

transferred, the value of which was in excess of the fair cost of annuity agreed to be paid to petitioner. This excess, it is contended, did not constitute consideration for the annuity but was a gift to the petitioner's children through the agency of the company and thus may not be included in the base on which the 3 percent taxable return is to be computed. (4) Finally, it is argued that \$2,666.25 of the amount in question may not be taxed as income in any event, for the wholly separate reason that it represented the proceeds of a loan.

(1) We may dispose of the first argument of the petitioner without extended consideration. The contract of May 15, 1929, may not, in our view, be interpreted as an ordinary sale or exchange of capital assets with payment to petitioner extended over several years. The distinguishing peculiarity of an annuity—that its continuance is dependent entirely on the life of the recipient of the payments—is here present. By statute, amounts received under contracts of this nature are made taxable to a limited degree and the direction of the statute may not be ignored. It can make no difference, in our opinion, that the consideration for the annuity was the transfer of property rather than money, and in this view we are sustained by *Florence L. Klein*, 6 B. T. A. 617, and *Guaranty Trust Co. of New York*, Executor, 15 B. T. A. 20.

(2) Adverting to petitioner's argument that the application of section 22 (b) (2) to the facts presented is unconstitutional, we deem this contention

without substantial basis. The scheme devised by Congress for taxing amounts received as annuities may not, in the light of its legislative history, be considered arbitrary, see Title Guarantee & Trust Co., Executor, 40 B. T. A. 475, 480-482, or a tax on capital, see F. A. Gillespie, 38 B. T. A. 673. It is rather a method reasonably arrived at, which in the great majority of cases will result fairly for both the taxpayer and the tax gatherer. In a situation where the division between income and a return of capital is difficult, if not impossible, some latitude must be allowed to the lawmaker and the possibilities for an arbitrary result in isolated cases must be appraised against the necessity for taxing the transaction in question both as a means to revenue and as a means to discourage or prevent tax avoidance. In the light of the circumstances requiring the enactment of the statute in question, which are set out more at length in the cases cited above and in Anna L. Raymond, 40 B. T. A. 244, we can not say that it is unconstitutional as sought to be applied here by the Commissioner. Accordingly, petitioner must fail in this contention.

(3) The alternative argument of the petitioner presents essentially a question of fact: Whether the consideration for the annuity agreed [149] to be paid to her under the contract of May 15, 1929, was the entire property transferred by her under that agreement, or only that portion of the property required to purchase those annuities from a reputable insurance company.

This identical question as it related to the tax liability of F. A. Gillespie, cotransferor with petitioner under the agreement of May 15, 1929, was before us in *F. A. Gillespie, supra*, and we held there that the entire properties transferred were consideration for the annuities, in view of the provisions of the contract and in the absence of other evidence explaining the purpose of the transferors in conveying properties in excess of the fair cost of such annuities. In the present case that excess has been explained and the deficiency in evidence supplied. In her deposition petitioner has testified that her purpose in making transfer of the excess properties was to benefit her children or grandchildren and to safeguard their future income. This she thought best to accomplish by transferring all but a small portion of her properties to the company, instigating thereby a similar transfer by her husband. Since the children were then the beneficial owners of the larger part of the company and were, by virtue of the 1921 trust agreement, to become the sole owners of the company, along with the grandchildren, this transfer secured to them the properties then owned by their parents. The last possibility of the diversion of any of it away from them was precluded by the provision of the contract of May 15, 1929, that F. A. Gillespie might not sell any of the stock of the company held by him as trustee without the consent of the directors of the company. Petitioner testified in this proceeding, in effect, that she gave her properties to the company to safeguard her children

and grandchildren, subject to the provision that certain sums be paid to her annually during her lifetime, and that she considered the remainder of the value of the property over the cost of such annuity to be a gift or contribution for the benefit of her children and grandchildren. This evidence, fitted with the circumstances of the instant case, compels the finding that the properties transferred to the company by petitioner in excess of the fair cost of the annuity secured to her thereby did not constitute consideration for that annuity. In the present circumstances it becomes unnecessary to go further and decide whether the excess amount was paid to the company as a gift, as in *Anna L. Raymond*, *supra*, or as a contribution to capital, see *Robert H. Scanlon*, 42 B. T. A. 997. In either event may this excess amount be included in the cost basis of the annuity required for computation of the tax due under section 22 (b) (2).

Respondent objects to the consideration of the evidence noted on two grounds: It is argued, first, that the "issue that a part of the [150] property transferred to the corporation was a gift" was not properly raised in the pleadings or at the hearing. This "issue" we regard as properly presented under petitioner's contention that only the fair cost of the annuities acquired may be used in computing the 3 percent limitation placed on the tax by section 22 (b) (2). It forms an integral part of that argument and need not be pleaded as a separate issue. In the second place, respondent has moved to strike peti-

tioner's entire testimony on this point on the ground that it is immaterial and that it conflicts with the parol evidence and best evidence rules. At the hearing ruling on this motion was reserved for disposition in this opinion. The materiality of the testimony to the issues presented we deem apparent. The parol evidence rule applies only as between the parties to the agreement and can not, therefore, apply in the instant case. See *Bertelson & Peterson Engineering Co. v. United States*, 60 Fed. (2d) 745; *Indianapolis Glove Co. v. United States*, 96 Fed. (2d) 816. Moreover neither rule may apply where there is ambiguity in the written language; here the terms of the two agreements entered into on May 15, 1929, conflict. In one the payment of annuities is described as "consideration" and in the other as "part consideration" for the transfer of the properties. The resultant confusion of meaning may properly be dispelled in this instance by the testimony of petitioner. See *Bertelson & Peterson Engineering Co. v. United States*, *supra*, at page 747. Cf. *A. L. Wilson Co.*, 24 B. T. A. 1056. This conflict of terms was noted in *F. A. Gillespie*, *supra*, at page 677, but in the absence of any explanatory evidence the presumption favoring the Commissioner compelled the result reached there. Respondent's objections and motion are accordingly overruled.

(4) The final point of controversy on which we must rule here is the petitioner's claim that \$2,-666.25 of the amount received from the company was intended as a loan to be used to discharge a

portion of the mortgage on petitioner's property, together with accrued interest. The evidence shows, however, that no note was executed as evidence of that loan, that no interest was agreed on or paid, and that no repayment of principal has been made. Neither was the loan reflected in the balance sheet of the company as an asset. In these circumstances, we think the petitioner has failed to make adequate proof that such an amount constituted a loan. The impression that it was paid as a part of the amount due under the agreement of 1929 is gained and strengthened by the fact that the company was a closely held corporation and that petitioner had shortly before the taxable year relinquished the right to receive a portion of her annuity in return for the payment of an installment on the mortgage in question [151] from another source. Accordingly, we hold that no part of the \$17,666.25 received by petitioner during the taxable year was a loan and that the entire amount was paid as an annuity under the contract of May 15, 1929.

There remains the determination of the amount of income taxable to petitioner. This is to be computed on the basis of 3 percent of the cost of an annuity of \$25,000 purchased by petitioner on May 15, 1929, from a reputable insurance company. The \$25,000 figure must be taken in preference to the \$15,000 sum contended for by petitioner, since the former amount was that for which the properties were transferred. Subsequent relinquishment of a portion of the annuity can not alter the determina-

tion of the amount which was transferred under the 1929 contract as consideration for the annuities receivable by petitioner. No argument is made, it should be noted, that the \$10,000 guarantee of the dividends to be received annually by petitioner did not in itself constitute an annuity. Both parties seem to concede that it falls in a class with the \$15,000 annuity and we have so treated it.

Since the parties have stipulated that the cost of such an annuity is \$327,562.50, petitioner's taxable income in 1935 is held to be 3 percent of that amount, or \$9,826.88.

Decision will be entered under Rule 50.

[Title of Board and Cause.]

MOTION FOR RECONSIDERATION

Comes now the petitioner in the above entitled cause by her counsel, Harold E. Rorschach, and moves this Honorable Board for an order granting:

A reconsideration of the case upon the basis of the record already made upon issue 4 (c) of the amended petition, for the reason that:

Member Hill prepared an opinion which was promulgated as the opinion of the United States Board of Tax Appeals on January 22, 1941, in the above entitled case. In said opinion the Honorable Board found that tax should be computed on the basis of 3% of the cost, as of May 15, 1929, of an annuity which would produce \$25,000 per year for petitioner.

It is submitted that the Board erred, in that a material fact has been misconstrued in the foregoing opinion; it is [153] now submitted that the Honorable Board should find that the tax should be computed on the basis of 3% of the cost, as of May 15, 1929 of an annuity which would produce \$15,000 per year for petitioner.

In support hereof, the petitioner submits the attached memorandum brief and requests that this motion be decided upon said brief, after an opportunity has been given the respondent to submit a counter brief.

All of which is

Respectfully submitted,
(Signed) HAROLD E. RORSCHACH
1046 Kennedy Building,
Tulsa, Oklahoma
Counsel for Petitioner

Denied Feb. 19, 1941.

SAM B. HILL
Member U. S. Board of Tax
Appeals

[Endorsed]: U.S.B.T.A. Filed Feb. 19, 1941.

[154]

United States Board of Tax Appeals

Docket No. 98770

MAUD GILLESPIE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its report promulgated January 22, 1941, it is

Ordered and Decided: That there is a deficiency in income tax due from petitioner for the calendar year 1935 in the amount of \$549.76.

[Seal] (S) SAM B. HILL
Member.

Enter:

Entered March 20, 1941. [155]

[Title of Board and Cause.]

PETITION FOR REVIEW BY THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

I.

Maud Gillespie, your petitioner, respectfully petitions this Honorable Court to review the decision of the United States Board of Tax Appeals entered on March 20, 1941, in finding a deficiency in income tax due from your petitioner for the calendar year 1935 in the amount of \$549.76. Your petitioner, at the time of filing this petition is a citizen of the United States and resides at Beverly Hills, California.

The return of income tax in respect of which the aforesaid tax liability arose was filed by your petitioner with the Collector of Internal Revenue for the Sixth Collection District of California, located in the City of Los Angeles, State of California, which is located within the jurisdiction of the Circuit Court of Appeals for the Ninth Judicial Circuit. [156]

Jurisdiction in this court to review a decision of the United States Board of Tax Appeals aforesaid is founded on Sections 1001-3 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, Section 1101 of the Revenue Act

of 1932, and Section 519 of the Revenue Act of 1934. (Sections 1141-1142, Internal Revenue Code).

II.

Nature of Controversy

Petitioner regularly filed her tax return for the calendar year 1935 with the Collector of Internal Revenue at Los Angeles, California, said return disclosing a loss of \$209.29. Thereafter, by registered letter dated March 2, 1939, the Commissioner of Internal Revenue adjusted the net income disclosed by the return, by an amount alleged to be annuities received in the sum of \$17,666.25, it being alleged that the addition to income was in accordance with the decision rendered by the United States Board of Tax Appeals in the case of F. A. Gillespie for the year 1934 (38 B.T.A. 673).

Your petitioner duly filed her petition, and thereafter by motion granted, filed her amended petition, and thereafter, during trial, amendment to amended petition was allowed by the Board and upon answers denying the material portions of the amended petition and amendment to amended petition, the cause was tried to the United States Board of Tax Appeals, Member Hill presiding. [157]

The issues in the case joined by the pleadings are as follows:

(a) Section 22 (a) (2) of the Revenue Act of 1934, in the manner sought to be applied to the taxpayer by the Commissioner of Internal Revenue, is unconstitutional and void and not within the pur-

view of the Sixteenth Amendment to the Constitution of the United States and is the taking of taxpayer's property without compensation.

(b) The payment made to Maud Gillespie in 1935 was pursuant to an agreement for the purchase of property having a cash cost in excess of \$1,000,000, the cost of which had not been returned to Maud Gillespie prior to the year 1935, nor during the year 1935.

(c) In the alternative, if it is determined that any part of the sum of \$17,666.25 received by Maud Gillespie during the year 1935 was taxable, then only such portion of the sum of \$17,666.25 is taxable as represents 3% of what an annuity would have cost at May 15, 1929 as would have produced the sum of \$15,000 per annum during the lifetime of Maud Gillespie.

The Board of Tax Appeals held:

(a) That the contract of May 15, 1929 was not an ordinary sale or exchange of capital assets, with payment to the petitioner extending over several years.

(b) Denied the petitioner's contention that the appli- [158] cation of Section 22 (b) (2) to the facts presented, is unconstitutional;

(c) That the petitioner agreed to transfer certain property to F. A. Gillespie and Sons Company, and as part consideration, the company agreed to pay petitioner two annuities, totalling \$25,000 annually, and held that the cost basis of the annuities to be used in computing the tax is the cost of

these annuities based upon the consideration for which a reputable life insurance company would have written an annuity for like amounts.

(d) Denied that the sum of \$2,666.25 was intended as a loan.

III.

ASSIGNMENT OF ERRORS

In making its decision as aforesaid, the United States Board of Tax Appeals committed the following errors, upon which your petitioner relies as a basis of this proceeding:

(a) The Board erred in finding that the contract of May 15, 1929 was not an ordinary contract of sale, or contract for the exchange of capital assets, the payment to petitioner extending over a period of years.

(b) The Board erred in not holding that the application of Section 22 (b) (2) to the facts presented was unconstitutional and void.

(c) The Board erred in not finding that the \$10,000 annuity was donated back to the company by Maud Gillespie under date of November 16, 1933.

[159]

(d) The decision and final order is not sustained by substantial evidence and is contrary to law.

(e) Error of law occurring at the trial, excepted to by the petitioner.

(f) The decision and final order is contrary to the evidence.

(g) The Board erred in its findings of fact and in its opinion, as promulgated on January 22, 1941, in that the same are contrary to law and contrary to the evidence.

Wherefore, your petitioner prays that this Honorable Court may review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same and direct the said Board to hold that there is no deficiency, and for the entry of such further orders and directions as shall by the court be deemed meet and proper in accordance with the law.

(Signed) HAROLD E. RORSCHACH

1046 Kennedy Bldg.

Tulsa, Oklahoma.

Counsel for Petitioner [160]

State of Oklahoma

County of Tulsa—ss.

Harold E. Rorschach, being duly sworn upon oath, deposes and says:

I am the attorney for the petitioner in this proceeding; I have prepared the foregoing petition and I am familiar with the contents and allegations of fact contained therein, and the same are true, to the best of my knowledge, information and belief.

This petition is not filed for the purpose of delay and I believe the petitioner is fully entitled to the relief sought.

(Signed) HAROLD E. RORSCHACH

Subscribed and sworn to before me this 18th day of June, 1941.

[Seal]

LENA ALLEN

Notary Public

My commission expires March 30, 1944.

[Endorsed] U.S.B.T.A. Filed June 19, 1941. [161]

[Title of Board and Cause.]

To: Commissioner of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

J. P. Wenchel, Chief Counsel,
Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

You are hereby notified that on the 19th day of June, 1941, a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals heretofore rendered in the above-entitled cause, was filed with the Clerk of the Board. A copy of the petition as filed is attached hereto and served upon you.

Dated June 19, 1941.

HAROLD E. RORSCHACH,
1046 Kennedy Building, Tulsa, Oklahoma.
Counsel for Petitioner.

Service of the foregoing notice of filing and of a copy of the petition for review is hereby acknowledged this 19th day of June, 1941.

J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed June 19, 1941.

[162]

[Title of Board and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes now Maud Gillespie, petitioner and appellant herein, by her counsel Harold E. Rorschach and hereby designates for inclusion in the record upon appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, the complete record in this cause, including all petitions, amendments thereto, answers and all other pleadings and motions, together with all the proceedings had herein, including the docket entries of the Clerk of the United States Board of Tax Appeals and all of the evidence, including oral testimony and exhibits introduced herein, and depositions and exhibits to depositions introduced herein, and herewith files two copies of the official court reporter's transcript of all the evidence, proceedings and rulings of the Member of the Board during the trial, together with two copies of all exhibits therein,

as prepared and certified to by the [163] said official court reporter, to be included in said record, and all orders, decisions, stipulations, findings of fact, judgments, decrees and decision or decisions of the United States Board of Tax Appeals.

(Signed) HAROLD E. RORSCHACH,
1046 Kennedy Building, Tulsa, Oklahoma, Counsel
for Petitioner.

The undersigned hereby acknowledges service of a copy of the foregoing "Designation of Contents of Record on Appeal", this 14th day of July, 1941.

J. P. WENCHEL,
Counsel for Respondent, Commissioner of Internal Revenue.

[Endorsed]: U. S. B. T. A. Filed July 14, 1941.
[164]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 164, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of

Tax Appeals, at Washington, in the District of Columbia, this 24th day of July, 1941.

(Seal) B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.
[165]

[Endorsed]: No. 9883. United States Circuit Court of Appeals for the Ninth Circuit. Maud Gillespie, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed August 4, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9883

MAUD GILLESPIE,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT RELIES ON APPEAL

Pursuant to Rule 19 of this Honorable Court, the appellant now files a statement of the points upon which she relies upon appeal herein and says that she relies upon each and every point set out below. Said points are as follows:

I.

The Board erred in finding that the contract of May 15, 1929 was not an ordinary contract of sale, or contract for the exchange of capital assets, payment to petitioner extending over a period of years.

II.

The Board erred in not holding that the application of Section 22 (b) (2) of the Revenue Act of 1934, to the facts presented was unconstitutional and void.

III.

The Board erred in not finding that the \$10,000 annual payment was donated back to F. A. Gillespie and Sons Company by Maud Gillespie under date of November 16, 1933.

IV.

The decision and final order is not sustained by substantial evidence and is contrary to law.

V.

Error of law occurring at the trial, and excepted to by the petitioner.

VI.

The decision and final order is contrary to the evidence.

VII.

The Board erred in its findings of fact and in its opinion, as promulgated on January 22, 1941, in that the same are contrary to law and contrary to the evidence.

HAROLD E. RORSCHACH,
1046 Kennedy Bldg., Tulsa, Oklahoma, Counsel for
Appellant.

Service of copy of the foregoing statement of points is hereby acknowledged on behalf of the appellee this 18th day of August, 1941.

J. P. WENCHEL,

Counsel for Commissioner of Internal Revenue.

[Endorsed]: Filed Aug. 23, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

MOTION BY APPELLANT, DESIGNATING
RECORD TO BE PRINTED

Comes now the appellant, Maud Gillespie, by her counsel, Harold E. Rorschach and designates for printing the entire transcript of the record received from the Clerk of the United States Board of Tax Appeals and certified under his hand and seal.

HAROLD E. RORSCHACH,
1046 Kennedy Building, Tulsa, Oklahoma, Counsel
for Appellant.

Service of copy of the foregoing designation of record to be printed is hereby acknowledged this 18th day of August, 1941.

J. P. WENCHEL,
Counsel for Commissioner of Internal Revenue.

[Endorsed]: Filed Aug. 23, 1941. Paul P. O'Brien, Clerk.

No. 9883

In the United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

ESTATE OF MAUD GILLESPIE, DECEASED, PARMER
A. GILLESPIE, EXECUTOR, *Petitioner*,
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

*Upon Petition to Review a Decision of the United States
Board of Tax Appeals.*

BRIEF for PETITIONER.

HAROLD E. RORSCHACH,
JACK L. RORSCHACH,
HAROLD C. HARPER,
Counsel for Petitioner.

FILED

NOV 1 1941

PAUL P. O'BRIEN,

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**IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

No. 9883

**ESTATE OF MAUD GILLESPIE, DECEASED, FARMER
A. GILLESPIE, EXECUTOR, *Petitioner,***

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

***Upon Petition to Review a Decision of the United States
Board of Tax Appeals.***

B R I E F *for* P E T I T I O N E R .

Opinion Below.

The finding of fact and opinion of the United States Board of Tax Appeals is reported in 43 B. T. A. #52 and is set forth in the printed record at page 142.

Jurisdiction.

The Commissioner of Internal Revenue made a determination that there was a deficiency in the income tax of the taxpayer, Maud Gillespie, in the amount of \$1,476.55, by registered letter dated March 2, 1939, directed to the taxpayer, for the calendar year of 1935 pursuant to section 272 of the Revenue Act of 1934 (R. 8).

Thereafter, on May 25, 1939, the taxpayer petitioned the Board of Tax Appeals for a redetermination of the deficiency (R. 1). On March 20, 1940, the United States Board of Tax Appeals entered its decision, from which decision appeal was perfected to this court by a petition for review filed June 19, 1941, pursuant to authority to review a decision of the United States Board of Tax Appeals by virtue of section 1142 of the Internal Revenue Code.

Maud Gillespie was a resident of Beverly Hills, California, and filed her income tax return for the calendar year of 1935 with the Collector of the Sixth Collection District of California, located in the City of Los Angeles in the State of California within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Statutes and Regulations Involved.

Revenue Act of 1928, section 44 (b) :

“Sales of Realty and Casual Sales of Personalty. In the case (1) of a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding \$1,000, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed 40 per centum of the selling price, the income may, under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner above prescribed in this section. As used in this section the term ‘initial payments’ means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made.”

Revenue Act of 1928, section 111:

(a) *“Computation of Gain or Loss.* Except as hereinafter provided in this section, the gain from the

sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.”

(b) * * *

(c) “*Amount Realized.* The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.”

Revenue Act of 1928, section 113 (a) :

“*Property Acquired After February 28, 1913.* The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property ; except * * * .”

Revenue Act of 1934, section 22 (b) (2) :

“*Annuities, etc.* Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. *Amounts received as an annuity under an annuity or endowment contract shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity* (whether or not paid during such year), until the aggregate amount excluded from gross income under this title or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such con-

sideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph.” (Italics added.)

Regulations 86, relating to income tax under Revenue Act of 1934, promulgated by the United States Treasury Department, article 22 (b) (2)-2:

“*Annuities.* Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. If an annuity is payable in annual installments, there shall be included in gross income only such portions of the amounts received in any taxable year as is equal to 3 per cent of the aggregate premiums or consideration paid for such annuity, whether or not paid during the taxable year, divided by the number of installments payable during such year. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income. The provisions of this article may be illustrated by the following examples: * * * .”

Revenue Act of 1934, section 44 (b) :

“*Sales of Realty and Casual Sales of Personalty.* In the case (1) of a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding \$1,000, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed 30 per centum of the selling price (or, in case the sale or other disposition was

in a taxable year beginning prior to January 1, 1934, the percentage of the selling price prescribed in the law applicable to such year), the income may, under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner above prescribed in this section. As used in this section the term 'initial payments' means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made."

Regulation 86 relating to income tax under the Revenue Act of 1934, promulgated by the United States Treasury Department, article 44-4, in part:

" * * * If the obligations received by the vendor have no fair market value, the payments in cash or other property having a fair market value shall be applied against and reduce the basis of the property sold, and if in excess of such basis, shall be taxable to the extent of the excess. Gain or loss is realized when the obligations are disposed of or satisfied, the amount being the difference between the reduced basis as provided above and the amount realized therefor. Only in rare and extraordinary cases does property have no fair market value."

Revenue Act of 1934, section 111:

"(a) *Computation of Gain or Loss.* The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

"(b) *Amount Realized.* The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received."

Revenue Act of 1934, section 113 (a):

“*Basis (Unadjusted) of Property.* The basis of property shall be the cost of such property, except that * * *.”

Statement of the Issues.

On April 24, 1920, F. A. Gillespie and Sons Company, a corporation, was organized, under the laws of the State of Oklahoma, with a capital stock of \$1,000,000.00 divided into 10,000 shares of \$100.00 each. The stock of this corporation was held .5 shares each, in the name of Maud Gillespie, F. A. Gillespie, and the three sons of Maud Gillespie and F. A. Gillespie: B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie; the remaining 9,975 shares were held in trust by F. A. Gillespie under a trust agreement dated the 9th day of February, 1921 (R. 11-17). By the terms of this trust agreement, 1,995 shares were held in trust for the life of each of the members of the Gillespie family.

On May 15, 1929, F. A. Gillespie and Maud Gillespie entered into a separation agreement and property settlement (R. 17-26).

On May 15, 1929, F. A. Gillespie and Maud Gillespie entered into an agreement with F. A. Gillespie and Sons Company (R. 27-30). By the terms of this agreement, F. A. Gillespie and Maud Gillespie agreed to convey to the corporation all of the real and personal property owned by each, with the exception of some personal real estate and \$100,000.00 in cash reserved by each; and in part consideration for the conveyance of this property, the corporation agreed to pay F. A. Gillespie the sum of \$15,000.00 per year, and to Maud Gillespie the same amount; and, in addition, the corporation agreed that Maud Gillespie should receive dividends in the amount of at least \$10,000.00 per year, and if funds were not available to be declared as dividends, the corporation agreed to pay Maud Gillespie from any source

the additional sum of \$10,000.00. It was further agreed that F. A. Gillespie should not sell or transfer any of the corporation stock of which he was trustee without the written consent of a majority of the board of directors of the corporation.

Thereafter, the terms of the agreement were carried out; and between the years 1929 and 1932, conveyances were executed and delivered carrying out the terms of the agreement (R. 145).

Under the terms of the agreement, F. A. Gillespie and Maud Gillespie conveyed to the company the following property of the values indicated which they owned jointly:

U. S. First Liberty Loan bonds and Port of New Orleans, Louisiana, state bonds	\$1,172,000.00
Empress Building, Tulsa, Oklahoma	150,000.00
Sundry lands and lots located in Okla- homa	22,512.00
Cash and accounts receivable	94,365.22
Sundry stocks	25,363.00
Total	<hr/> \$1,464,240.22

The costs of the above properties to F. A. Gillespie and the petitioner equalled or exceeded the above fair market values. Maud Gillespie was the owner of one-half of the above properties delivered to the company under the contract of May 15, 1929, and one-half of the cost of same was hers.

However, no payments were made to Maud Gillespie until the year 1932, at which time an adjustment was made for the amounts due under the agreement from May 15, 1929, to the end of the year 1932 (R. 148). Up to December 31, 1935, Maud Gillespie had received the sum of \$94,894.01 under the terms of the contract of May 15, 1929 (R. 148).

Thereafter, on November 16, 1933, Maud Gillespie agreed to a suspension of the guaranteed dividend payment of \$10,000.00 per year (Exhibit 1, R. 118) (R. 148).

During the calendar year 1935, Maud Gillespie received from F. A. Gillespie and Sons Company the sum of \$17,-666.25, which she did not report on her tax return for that year as being taxable income. Thereafter, the Commissioner of Internal Revenue on March 2, 1939, sent a registered letter directed to Maud Gillespie in which it was proposed to assert a deficiency of income tax for the year 1935 in the amount of \$1,476.55. The determination of this deficiency, as claimed by the Commissioner was by reason of his considering the sum of \$17,666.25 as an annuity payment, the whole of which he claimed to be taxable, under provisions of 22 (b) (2) of the Revenue Act of 1934 (R. 9).

Thereafter Maud Gillespie filed her petition with the United States Board of Tax Appeals appealing from such determination by the Commissioner of Internal Revenue.

Thereafter, the case came on for a hearing on its merits before Member Hill on May 16, 1940, at which time the depositions of Charles Green and Maud Gillespie were received and oral testimony and documentary testimony submitted on behalf of the taxpayer.

The issues as made up by the petition as amended and the answers filed in reply thereto by the Commissioner of Internal Revenue and the testimony, exhibits and stipulation left for decision with the United States Board of Tax Appeals, substantially, these four questions:

- (1) Was the payment made to Maud Gillespie in calendar year under the contract of May 15, 1929, by which F. A. Gillespie and Sons Company acquired property in excess of a value of \$1,000,000.00 from F. A. Gillespie and Maud Gillespie, and which had a cost to them of more than \$1,000,000.00, in the nature of a deferred payment

on the sale of the foregoing from which no profit could arise until the cost had been recovered?

- (2) Was section 22 (b) (2) of the Revenue Act of 1934, unconstitutional and void in its application by the Commissioner of Internal Revenue to the facts herein?
- (3) In any event, no more than \$15,000.00 was received by Maud Gillespie during the year 1935 from F. A. Gillespie and Sons Company under the contract of May 15, 1929, and which could be subject to any income tax statute; the remaining amount of \$2,666.25 being a loan to taxpayer from F. A. Gillespie and Sons Company.
- (4) In the alternative, if any part of the sum of \$15,000.00 received by Maud Gillespie from F. A. Gillespie and Sons Company during the year 1935 was taxable, then only such portion of the \$15,000.00 is taxable as represents 3 per cent of what an annuity would have cost at May 15, 1929, as would have produced the sum of \$15,000.00 per annum during the lifetime of Maud Gillespie.

From the foregoing issues as framed, the Board of Tax Appeals, by Member Hill, determined that the corporation had agreed to pay petitioner two annuities, one for \$15,000.00 and one for \$10,000.00 (R. 142), annually and that the cost of acquiring these annuities on May 25, 1929, would have been \$327,562.50 (R. 150), and the balance of the value of the property delivered was a contribution to the company; and that, hence, taxpayer was taxable, in accordance with section 22 (b) (2) of the Revenue Act of 1934, on the amount of 3 per cent of \$327,562.50, or the sum of \$9,826.88. (R. 158)

The member of the Board holding against taxpayer's contention that the contract of May 15, 1929, constituted a sale of property transferred with payment to be made in annual installments (R. 150-152); and holding that section 22 (b) (2) of the Revenue Act of 1934 was constitutional in so far as it was sought to be applied in the instant case by

the Commissioner (R. 153); and holding further that the \$2,666.25 was a part of the annuity payments received under terms of the contract of May 15, 1929 (R. 156).

Thereafter, motion for reconsideration was filed (R. 158) and denied. Decision was entered on March 20, 1941 (R. 160), and, thereafter, petition for review by the United States Circuit Court of Appeals for the Ninth Circuit was filed; and, thereafter, statement of points upon which the appellant relies for appeal was filed with this court.

Issues on Appeal.

Taxpayer contends that the Board erred in the following respects:

I.

In finding that the contract of May 15, 1929, between Maud Gillespie and F. A. Gillespie and F. A. Gillespie and Sons Company was not an ordinary contract of sale or contract for the exchange of capital assets the payment for which was on the deferred payment basis to petitioner extending over a period of years.

II.

In not holding that the application of section 22 (b) (2) of the Revenue Act of 1934, as applied by the Commissioner of Internal Revenue, to the facts presented was unconstitutional and void.

III.

In not finding that of the sum of \$17,666.25 received by Maud Gillespie during the year 1935 from F. A. Gillespie and Sons that \$15,000.00 represented payment to her under the contract of May 15, 1929, and \$2,666.25 represented a loan made to her by the company.

IV.

In the alternative, if any part of the \$15,000.00 payment is taxable to Maud Gillespie, then the amount which was

taxable could not exceed 3 per cent of the cost of acquiring an annuity upon the life of the taxpayer on May 15, 1929, which sum amounted to \$196,537.50, three per cent of which would amount to \$5,896.13; and in not finding that the \$10,000.00 annual payment was donated back to F. A. Gillespie and Sons Company by Maud Gillespie under date of November 16, 1933.

Summary on the Argument.

An agreement, whereby an Oklahoma corporation, organized for the purpose of engaging in the oil business, promised and agreed to make future payment to the taxpayer during her life, was made in consideration of the transfer by her to such corporation of certain stocks and bonds and other property, which contract had no fair market value when received by the petitioner. And, if the cash payments received during the year in which the agreement was made did not exceed the cost basis of the stock, neither did the amounts received for the other years up to and including the year in question exceed the cost basis of the stock; then the taxpayer realized no taxable gain from the amount received in the year 1935.

Of the entire value of the property transferred by the petitioner not less than one-half the sum of \$1,464,240.22, or \$732,120.11, constituted a consideration paid for the sums received and to be received by her. The aggregate amount received by the petitioner up to December 31, 1934, was \$79,894.01; hence, none of the payments received in 1935 could be taxable, as the taxpayer has recovered, by way of cash payments, scarcely more than 10 per cent of her cost in the property transferred.

The application of section 22 (b) (2) of the Revenue Act of 1934, as applied to the facts presented, was unconstitutional and void. The United States Board of Tax Appeals found that the taxpayer delivered securities having a

fair market value and a cost of not less than \$732,120.11 to the corporation, as consideration under the contract of May 15, 1929. In the enactment of section 22 (b) (2) of the Revenue Act of 1934, it obviously was the intent of Congress to attempt the levy of a tax upon annuities based upon 3 per cent of the cost on the supposition that an annuitant, receives at least that rate of interest return on the amount paid by the annuity.

The Board held that the taxpayer should be taxed on the amount of \$9,826.88 per year, that being 3 per cent of what an annuity would have cost which would have produced \$25,000.00 per year to the taxpayer. The taxpayer has actually been receiving \$15,000.00 per year, of which sum \$5,173.12 would be a return of capital upon the basis as determined by the Board of Tax Appeals.

Assuming, but not admitting, that the payments received might be classed as annuity payments, if Your Honors approve the decision of the Board, it would require the taxpayer 141½ years to recover her costs of the property delivered to the corporation, under the terms of the contract, in return for the payments which she is receiving. The taxpayer, who was 63 years old in 1935, would need to live to the ripe old age of 198½ years to recover her capital. Such an anomalous situation clearly demonstrates that either section 22 (b) (2) of the Revenue Act of 1934 is unconstitutional as applied in this case or that section 22 (b) (2) is not applicable in this case.

The Board erred in not finding that the \$10,000.00 annual payment was donated back to F. A. Gillespie and Sons Company by Maud Gillespie under the supplemental agreement of November 16, 1933. In the alternative, if it is found that any part of the \$15,000.00 payment made by the company in 1935 under the contract of May 15, 1929, is taxable to Maud Gillespie; then the amount which was tax-

able could not exceed 3 per cent of the cost of acquiring an annuity which would have produced that amount on May 15, 1929. The cost of acquiring such an annuity would not exceed the sum of \$196,537.50, three per cent of which would amount to \$5,896.13.

The Board in its opinion concedes the donative intent of the petitioner in donating to the corporation and to her children and grandchildren the remainder of the value of the property over the cost of an annuity as a gift or contribution for the benefit of those children and grandchildren. Would it not be as reasonable to perceive the donative intent of the petitioner on November 16, 1933, as on May 15, 1929? If the taxpayer was donating property in excess of the cost of a \$25,000.00 annuity on May 15, 1929, could she not just as reasonably donate the additional value in 1933 when she entered into a new agreement relieving the company of the \$10,000.00 dividend guarantee?

The Board erred in not finding that of the sum of \$17,666.25, received by Maud Gillespie during the year 1935 from F. A. Gillespie and Sons Company, that \$2,666.25 represented a loan made to her by the company. The Board found as a fact that the \$2,666.25 represented a payment to her under the contract of May 15, 1929, and did not represent a loan made to her by the company, F. A. Gillespie and Sons Company, as contended by the taxpayer.

The member in writing the opinion admitted that the taxpayer overcame the presumption, that the determination by the Commissioner was correct, by holding that the sum of \$17,666.25 was not entirely the proceeds of an annuity. The Commissioner made no determination with respect to the \$2,666.25 except that it constituted an annuity payment. There is no evidence in the record, nor finding by the Commissioner, to support any other finding of fact than that the sum of \$2,666.25 represented a loan made to the taxpayer by the company, F. A. Gillespie and Sons Company.

ARGUMENT.

I.

Of the sum of \$17,666.25, \$15,000.00 was paid pursuant to the contract of May 15, 1929, and constituted a part of the payment price for the purchase of assets.

The attention of your honors is directed to the agreement of May 15, 1929, between the taxpayer, Mr. Gillespie and F. A. Gillespie and Sons Company (R. 27). There were two considerations for the transfer of the property; one of which was the payment of \$15,000.00 per year each to Mr. and Mrs. Gillespie, with an additional \$10,000.00 per year dividend guarantee, which later was taken out from under the terms of the contract by the letter of November 11, 1933, and paragraph 2 of the contract, which reads as follows:

“The husband agrees with the wife and with the corporation that the said F. A. Gillespie will not sell or transfer any of the corporate stock of the corporation now standing of record in the records of the corporation in accordance with the terms of the declaration of trust dated February 9, 1921, hereinabove referred to, *without the written consent so to do of a majority of the Board of Directors of the corporation.*” (Italics ours.)

Under the terms of the declaration of trust of February 9, 1921 (R. 11), F. A. Gillespie had the authority to sell or otherwise dispose of the stock of F. A. Gillespie and Sons Company as he saw fit. Under the trust agreement of February 9, 1921, Mr. Gillespie was holding 9,975 shares in trust out of the 10,000 shares authorized. The restriction placed on the sale of this stock under the terms of the trust agreement was undoubtedly a very valuable right and the surrender of it undoubtedly was worth a great deal to Mrs. Gillespie and to the corporation.

The intent of the parties is always to be considered when any question arises with respect to the construction

of a contract. It was the intent of Mrs. Gillespie to turn her property over to the corporation in consideration of the payment to her of \$15,000.00 per year and any residue in excess of the amount which she received was turned in to the company for the benefit of her children and grandchildren (R. 71-73). Mrs. Gillespie, upon being questioned concerning the trust agreement and the property turned over to the corporation, made this statement:

“Oh, yes, surely, I turned this over so that my sons and my grandchildren would benefit by it.” (R. 71),

and at R. 72 (in her deposition) she again answered:

“Well, I figured that was turned in to the company for the benefit of my children and my grandchildren.”

She testified that she did not intend purchasing or acquiring an annuity on her life. At R. 73, she said:

“Well, I made—I gave my property to the company to safeguard my children and my grandchildren.”

After the payments to her were made during her lifetime, it was her intention to consider the remainder over as a gift or contribution to the corporation for her children and grandchildren. Upon being asked this question:

“And do you consider the remainder of the value of this property as a gift or contribution to your children?”

she answered,

“It was just a gift to my children and my grandchildren.” (R. 73-74)

A. N. Murphy, an officer of the First National Bank and Trust Company of Oklahoma City for more than ten years, testified that he had examined the contract and that his bank had handled similar contracts covering the sale of personal property and oil and gas property in the State of

Oklahoma, and that such contracts were not unusual. At R. 106, Mr. Murphy testified:

“By Mr. Rorschach:

Q. Have you had experience with any other agreements similar to the agreement dated May 15, 1929, and marked Exhibit D, and attached to the petitioner's petition?

Mr. Anderson: That is objected to as immaterial. The proper foundation has not been laid.

The Member: Objection overruled.

A. I have.

By Mr. Rorschach:

Q. What experience have you had with other agreements of a similar character, covering the sale of personal property and oil properties in the State of Oklahoma?

Mr. Anderson: Objected to as immaterial.

The Member: Objection overruled.

A. They have been up in our discount department through matters of applications for loans. We have handled quite a few in our trust department, sometimes involved in a trust and sometimes in an escrow.

Those are the direct experiences I have had with such matters.”

Mr. Murphy also testified that such a contract had no fair market value and that it was highly speculative, because the payments of money provided would cease upon the death of one of the parties (R. 103, 106):

“Q. I hand you an agreement dated the 15th of May, 1929, which is Exhibit D attached to the petitioner's petition, and ask you to examine same and state if similar agreements have been tendered to you, on behalf of your bank, evidencing the right of the grantor to receive income similar to this agreement?

A. They have.

Q. I ask you again to refer to the agreement which

is attached to the petitioner's petition, and marked Exhibit D, dated May 15, 1929, and ask you if you have an opinion as to whether or not your bank would make a loan to either F. A. Gillespie or Maud Gillespie, taking as collateral for the loan an assignment of the payments to be made to either F. A. Gillespie or Maud Gillespie?

Mr. Anderson: I object.

The Member: I think you are restricting it too much there. One bank might be willing to, and another bank might not be willing to.

Mr. Anderson: I will object on the other ground that it is immaterial.

The Member: I do not know whether it is or not. I will overrule the objection on that ground.

By Mr. Rorschach:

Q. Will you state whether you have an opinion as to whether your bank or any other commercial bank would or would not make a loan——

Mr. Anderson (interrupting): I object to that, your honor, as to his stating his opinion of what another bank would do.

The Member: What I had in mind was whether, as a banker, his experience, if any, gives him an opinion in the nature of an expert opinion as to whether such commercial paper would be deemed by the bank as collateral.

Mr. Anderson: I object, your honor. He has not been qualified to give an expert opinion.

Mr. Rorschach: He stated he was assistant trust officer of the First National Bank and Trust Company and has taken up matters similar to this contract with the discount committee of his bank, and identified the contract, and stated he examined a contract similar to this contract.

Of course, I will admit, your honor, some bankers may not be qualified, but I believe, your honor, most bankers generally are conceded to be.

The Member: That seems to be the point, whether his own bank would recognize it as a basis for loans.

By Mr. Rorschach:

Q. Let me ask you, Mr. Murphy: How long have you been with the First National Bank & Trust Company of Oklahoma City?

A. More than 10 years.

Q. In the last 10 years have you discussed contracts of this nature with national bank examiners, and examiners for the Federal Deposit Insurance Corporation?

A. I have.

Q. Have you an opinion, then, as to whether or not a so-called commercial loan could be based upon such a contract as this? That is, could such a contract be considered by a commercial bank as collateral security for a loan?

A. I have such an opinion.

Q. Will you state what that opinion is?

A. It would have no value for a commercial loan, not only in the bank I am associated with but other banks in this section of the country.

Q. Will you state the reason for that opinion?

A. It has no set value. It is speculative, because the payments of money provided there cease upon the death of the party.

Mr. Anderson: Just a minute. I would like the record to show, your honor, I am objecting to all this line of testimony as being immaterial.

The Member: Objection overruled. Exception allowed.

The Witness: I might say, further, I am satisfied that if they did make such a loan the national bank examiners would require them to charge it off.

Mr. Anderson: I move that that be stricken as hearsay.

The Member: I think it is within the scope of his qualifications. I will overrule the objection. He is stating his own opinion. He is not giving it as hearsay."

By the terms of the agreement of May 15, 1929, all of the property of Mr. and Mrs. Gillespie was transferred to the corporation, and the corporation agreed to pay for the property by the payment of certain specified sums annually to Mr. and Mrs. Gillespie. The transaction was concluded under the provisions of the Revenue Act of 1928, sections 44 (b), 111 (a) (c) and 113 (a), governing the transaction.

The contract of May 15, 1929, had no fair market value; hence, the sale of the bonds and other property was upon the deferred payment basis, and the amount received by the taxpayer in the year 1935 was covered by the applicable provision of the Revenue Act of 1934. Section 44 (b) of the act and the regulations promulgated thereunder provide that the payments received in cash should be applied against, and reduce, the basis of the property sold and that no gain should be realized until the cost basis of the property had been returned to the taxpayer.

The contention by the Commissioner of Internal Revenue that the amount received was an annuity payment and, hence, taxable under the provision of section 22 (b) (2) of the Revenue Act of 1934; and the approval of that finding in part by the Board is without support either in fact or law.

F. A. Gillespie and Sons Company, an Oklahoma corporation, had no authority to issue annuities or annuity insurance on May 15, 1929, or any other time.

The laws prevailing in the State of Oklahoma on May 15, 1929, and up to the present time, with respect to companies authorized to write insurance, etc., provide as follows:

36 Okl. St. Ann. 6:

“Ten or more persons may form a corporation for

the purpose of making any of the following kinds of insurance, to-wit:

“ * * * 3. Upon the lives or health of persons, and every insurance appertaining thereto, and to grant, purchase or dispose of annuities.”

36 Okl. St. Ann. 8, provides as follows:

“No companies shall be formed in this State or foreign company admitted to this State for the purpose of engaging in any kind of insurance other than that specified in its certificate of incorporation, original or amended, nor any kind of business except that allowed domestic corporations under this article and in no instance other than that specified in some one of the subdivisions of section 3404, or more kinds of insurance than are specified in a single subdivision, except that a company may be formed: (1) for the purpose specified in subdivisions first, second and twelfth; (2) for the purposes specified in subdivisions third and fourth; or (3) for any or all of the purposes specified in subdivisions fourth to thirteenth, inclusive; contracts for each of the kinds of insurance specified in the subdivisions of section 3404, shall be in separate and distinct policies, except that the same policy may embrace risks specified in subdivisions third and fourth.”

36 Okl. St. Ann. 3, provides as follows:

“From and after the passage and approval of this act, all contracts of insurance made and entered into by insurance companies, corporations, associations, joint stock companies or other persons not having first complied with the laws of the State of Oklahoma, by not having obtained a permit to transact insurance business within the State of Oklahoma from the Insurance Commissioner or the State Insurance Board of said State, shall be null and void, and no property owner or his agent in the State of Oklahoma, shall be liable to such insurance company, association or other person for the payment of any premium upon such contract or insurance and no action therefor may be maintained in any of the courts of this State.”

If Your Honors hold with the Commissioner of Internal Revenue that the amount received by this taxpayer from F. A. Gillespie and Sons Company under the contract of May 15, 1929, is received pursuant to a contract of annuity insurance, then the contract is void.

It is submitted that Your Honors must indulge in the presumption that F. A. Gillespie and Sons Company would not violate the laws of the State of Oklahoma, the state in which it is chartered to do business, and attempt to write a contract which was in no wise authorized by its charter. Furthermore, if Your Honors hold that Mrs. Maud Gillespie had a contract of annuity insurance, such contract would be void and of no force nor effect.

An examination of the articles of incorporation of F. A. Gillespie and Sons Company (R. 127) plainly indicates that said corporation was chartered for the purpose of dealing in oil and gas leases, real estate and other manufacturing and mercantile pursuits. The property which it acquired by virtue of the contract of May 15, 1929, was the acquisition of property the same as any corporation might acquire property and pay for same upon a deferred or installment plan basis.

Witness Murphy (R. 103-108) stated that the agreement was no more than a sales contract or sales agreement of which his bank had handled several.

Of the sum of \$17,666.25, \$15000.00 was paid pursuant to the contract of May 15, 1929, and such sum is not an annuity.

Webster defines "annuity" as "an amount of money payable yearly for a certain or an uncertain period." The word "annuity" derives its meaning from the Latin word "*annuitas*" which is derived from the Latin "*annus*," meaning year.

In *Solicitor's Opinion 160, Cumulative Bulletin III-2*, page 60, Solicitor of the Internal Revenue held:

“An annuity is a stated sum payable at stated times during life or a specified number of years under an obligation to make the payments *in consideration of a gross sum paid for such obligation.*” (Italics ours.)

In this case, Mrs. Gillespie paid no gross sum under the terms of the contract, but transferred property such as stocks, bonds, real estate, etc. (See Stipulation of Facts, R. 94.)

In *Chisholm v. Shield*, 66 N. E. 93, the court said:

“An annuity as understood in common parlance is an obligation by a person or a company to pay to an annuitant a certain sum of money at stated times during life or a specified number of years *in consideration of a gross sum paid for such obligation.*” (Italics ours.)

The British income taxing system was probably the most widely known system at the time of the adoption of the Sixteenth Amendment. The English usage therefore might give some indication as to what was deemed income and taxable under income tax acts. The British Act has always considered an annuity as income. The British judges have endeavored to prevent a harsh construction of the statute, by distinguishing the thing taxable as an “annuity” from other receipts resembling it and sometimes loosely termed “annuities.”

In *Foley v. Fletcher*, 3 H. & N. 769, the plaintiff sold mining property at a named price to the defendant. He promised to pay the price in semi-annual installments running over some thirty years. The defendant deducted the income tax from the periodical payments, as he deemed the British laws required, and the plaintiff sued therefor and was met by a plea setting forth the purpose of the deduction. The court admitted that an annuity was expressly taxable but

concluded that Parliament had not intended to levy an assessment on capital and decided that the installments in question were capital and not taxable as annuities or otherwise.

Baron WATSON formulated a definition of annuity, page 764:

“An annuity means where income is purchased with a sum of money, and the capital has gone and ceased to exist, the principal being diverted into an annuity.”

In *Secretary of State in the Council of India v. Scoble*, 2 K. B. 413 (1903), 1 K. B. 494 (1903), the facts are somewhat similar to the *Foley* case except that the contract termed the installments an annuity and each installment was stated to be composed of (1) a part payment of principal and (2) interest on unpaid principal. The court again held that the designation of the payment as an annuity by the contract did not make it in fact an annuity and that no tax could be exacted on the payment of the principal and that the tax could only be exacted on the amount paid as interest.

By the transfer of the property by Mrs. Gillespie to the corporation under the contract of May 15, 1929, it cannot be said that she purchased income with a sum of money and that the capital had gone and ceased to exist. While it is true that to some extent, Mrs. Gillespie has lost control of the property which she delivered to the corporation, she still retains her interest as a stockholder and her beneficial interest, consisting of a one-fifth interest in the corporation under the terms of the trust agreement of February 9, 1921. Also one element of a consideration of the contract of May 15, 1929, was the promise by F. A. Gillespie to refrain from disposing of any of the stock of F. A. Gillespie and Sons Company under the trust agreement of February 9, 1921. Thus, it can be seen that Mrs. Gillespie did not purchase an

annuity and that her capital has not gone and ceased to exist, in the sense as defined by Baron WATSON.

By reference to the report on "*Prevention of Tax Avoidance*,"* and the *Report of the Committee on Ways and Means*, and the *Senate Report with Reference to the Revenue Bill of 1934* it can readily be seen that Congress had in mind the taxation of pure annuities purchased by persons from insurance companies and agencies engaged in the writing of this class of business; that is, the purchase of an annual income with a sum of money from an insurance or trust company engaged in writing that class of risks.

In "*Prevention of Tax Avoidance*"* the committee stated in its recommendations that "*some amount representing the portion of the annuity receipts consisting of interest be made subject to the income tax.*" (Italics ours.)

The report of the Committee on Ways and Means stated:

"Payments to annuitants are, in fact, based upon mortality tables which purport to reflect a rate of return sufficient to enable the annuitant to recover his cost, and in addition thereto, a *low rate of return on his investment.*" (Italics ours.)

The Senate Report stated:

"Payments to annuitants are, in fact, based upon mortality tables which purport to reflect a rate of return sufficient to enable the annuitant to recover his cost, and in addition thereto, a *low rate of return on his investment.*" (Italics ours.)

It is submitted to Your Honors that if the Board is upheld in its contention that the contract of May 15, 1929, is an annuity contract, then Your Honors are holding a contract taxable as an annuity contract which was not in con-

*Preliminary report of a subcommittee of the Committee on Ways and Means, "*Prevention of Tax Avoidance*," submitted under date of December 4, 1933.

templation by Congress at the time of consideration of section 22 (b) (2).

Congress contemplated that an annuitant would at some time recover his cost. In the instant case, it is physically impossible for this taxpayer to recover her cost unless she lives to be 106 years of age.

The Board of Tax Appeals has previously held that an agreement providing for the sale of the interest of a deceased partner to surviving partners and the payment therefor upon an annual basis out of the proportion of the partnership profits, constituted a purchase of the capital assets and that there should be included in the net income of each of the surviving partners his distributable share of the amounts paid to the heirs of the deceased partner in accordance with the terms of the agreement. *Willard C. Hill v. Commissioner*, 14 B. T. A. 572.

We have a parallel situation in this case. Mr. and Mrs. Gillespie transferred certain assets to a corporation in which they held a controlling interest and in return had an agreement by the corporation to pay them certain annual payments in return for the assets. Certainly this transaction constituted a purchase of capital assets and the income from these acquired assets were taxable to the corporation. Funds which were used to pay for the assets over the period of years to Mr. and Mrs. Gillespie might come from any source, either income or capital. The purchase of these assets by the corporation was exactly on the same basis as they might purchase assets from anyone not a stockholder.

Congress contemplated that an annuitant would at some time recover his cost. Obviously, if this was not in contemplation by Congress, then section 22 (b) (2) would be unconstitutional and void. In the instant case, under the decision of the Board, the taxpayer is receiving \$15,000.00 per year under the contract, of which \$9,826.88 is considered in

this decision as income and \$5,173.12 as a return of capital (R. 158). If it be considered that the taxpayer has an investment, as was found by the Board, in this "annuity" of \$327,562.50, then it would require 63 years for the taxpayer to recover her "assumed" cost. If her actual cost be considered as one-half of \$1,464,240.22, or \$732,120.11, then it would require 141½ years for the taxpayer to recover her cost. She was 57 years of age when the agreement of May 15, 1929, was entered into; therefore, she would need to attain the age of 120 years in order to recover her "assumed" basis, or 198½ years to recover her actual basis. Obviously, such an assumed age is a physical impossibility.

The Board has held that in an agreement identical with the one here involved, whereby future payments were made to the taxpayer during his life in consideration of the transfer of certain personal property, that no taxable gain was realized until the cash payments received exceeded the cost basis of the stock. *J. Darsie Lloyd v. Commissioner*, 33 B. T. A. 903. In that case the father of Harold Lloyd, the famous comedian, owned 2,499 shares of stock in the Harold Lloyd Corporation. The cost basis in his hands on April 16, 1930, was \$122,567.68, on which date he transferred the shares to his son, Harold Lloyd, pursuant to a written contract, the contract providing that Harold Lloyd should pay in consideration of the transfer of the shares the sum of \$100,000.00 a year, payable quarterly, beginning on the first day of May, 1930, so long as both parties should live; and, in the event that Harold Lloyd should pre-decease his father, the estate would pay the sum of \$50,000.00 per year, quarterly, during the remaining period of the father's life.

\$75,000.00 was received during 1930 under this contract. In holding that the agreement for sale was on the basis of a deferred payment and that no taxable gain was realized until the cash payments exceeded the cost, the Board stated:

“The petitioner completely disposed of 2,499 shares of Harold Lloyd Corporation stock in 1930. The question is whether he realized from the transaction any gain taxable in 1930. Section 111 of the Revenue Act of 1928 provides that the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis. The basis here has been stipulated. The amount realized is defined in section 111 (c) as ‘the sum of any money received plus the fair market value of the property (other than money) received.’ The petitioner received no money on April 16, 1930, when he parted with his stock. He received \$75,000 in cash later in 1930 under the agreement. Unless the amount realized included property (other than money) having a fair market value, there was no taxable gain for 1930 from the transaction, since the cash did not equal the basis of \$122,567.68. The petitioner received the promise of his son, Harold, expressed in the contract, to make certain annual payments of money in the future. Did that represent property having a fair market value within the meaning of section 111 (c)?

“The petitioner did not give his stock to his son. The transfer was supported by a valuable consideration, the promise and agreement to make payments in the future. We are not called upon to determine the cost of the stock to Harold, but rather to determine whether the petitioner received any property having a fair market value on April 16, 1930, upon which an immediately taxable gain should be computed. Sometimes it is necessary to determine a value for a certain tax purpose but not for another, and sometimes the two sides of a transaction do not receive parallel tax treatment. *Logan v. Commissioner*, 42 F. (2d) 193, and the same case affirmed by the Supreme Court, *Burnet v. Logan*, 283 U. S. 404; *Alexander D. Falck*, 26 B. T. A. 1359, affd., 71 F. (2d) 656, *certiorari* denied 293 U. S. 608. Cf. *Steinbach C.*, 3 B. T. A. 348; *John C. Moore Corporation*, 15 B. T. A. 1140; *Florence L. Klein*, 6 B. T. A. 617; *Scott v. Commissioner*, 29 F. (2d) 472; *Simpson v. United*

States, 252 U. S. 547. Where marketable exchangeable promises to pay are accepted as a part of a purchase price, their fair market value is included in the 'amount realized' and a taxable gain is realized immediately. Cf. *Ruth Iron Co.*, 4 B. T. A. 1151, affd. 26 F. (2d) 30; and *Kosmerl v. Commissioner*, 25 F. (2d) 87. But promises to make future payments do not always have an exchangeable value (*Eisner v. Macomber*, 252 U. S. 189) and are not always income when received. *Bedell v. Commissioner*, 30 F. (2d) 622; *Dudley T. Humphrey*, 32 B. T. A. 280. In such cases the actual payments as made are taxed as income when received in excess of the basis. The petitioner reported his profit in that way.

"The fair cost of an annuity based upon experience tables giving life expectancies can be determined by actuaries. A similar method would have to be used in order to estimate the present value of an annuity to the annuitant. But here a new element enters the computation, the uncertainty as to whether or not the one agreeing to make payments will be able to make them as agreed when the time for payment actually arrives. This difficulty might not be so great in the case of a sound insurance company regularly engaged in granting annuities, or perhaps, in the case of a bank. Cf. *Guaranty Trust Co. of New York, Executor*, 15 B. T. A. 20. Laws have been enacted to safeguard investors of such institutions. But that kind of an annuity is not involved in this case. Harold C. Lloyd was an individual. He was wealthy in 1930 but he was not engaged in the business of granting annuities, and his investments were not subject to restrictions and supervision as are those of insurance companies and banks. The evidence shows that the contract of April 16, 1930, whereby Harold C. Lloyd promised and agreed to make future payments to his father, the petitioner, had no fair market value within the meaning of section 111 (c) when received by the petitioner on April 16, 1930. Cf. *Helvering v. Louis*, 77 F. (2d) 386, reversing 29 B. T. A. 1200; *Commissioner v. Newbury*, 80 F. (2d) 631. The Commissioner erred in including any gain from the transaction in the petitioner's income for 1930."

We are confronted in this case with exactly the same situation with which the Board was confronted in the *Lloyd* case. The contract of May 15, 1929, had no fair value. F. A. Gillespie and Sons Company was not in the insurance business nor engaged in granting annuities. It was not under the supervision of any insurance commission. In fact, if the contract was an annuity or insurance contract, then F. A. Gillespie and Sons Company had violated the laws of the State of Oklahoma, and the contract under the provisions of 36 Okl. Stat. Anno. 3, was void and of no force nor effect.

Conversely, it has been held by the Board and many courts that the acquisition of property by the payment of annual amounts, or "annuities," is an acquisition of capital assets for a stated purchase price and the annual payments are not deductible as interest on indebtedness, but only result in the postponement of the payment of the purchase price into the future. *Klein v. Commissioner*, 84 F. (2d) 310, 17 A. F. T. R. 1289; *Evans v. Rothensies*, District Court, Eastern District of Pennsylvania, Prentice-Hall, 1939, page 5.1193; *Scott v. Commissioner*, 29 F. (2d) 472; *Mastin v. Commissioner*, 28 F. (2d) 748; *Daniel Brothers v. Commissioner*, 28 F. (2d) 761; *Corbitt Investment Company v. Helvering*, 75 F. (2d) 525; *Steinbach Kresge Company*, District Court, District of New Jersey, 33 F. Supp. 899; *Denman Estate Company v. Commissioner*, 2 B. T. A. 633, I. T. 1242 1-1 C. B. 61, I. T. 1-2 C. B. 66.

Obviously there is no other conclusion which can reasonably be reached except that the sale was a deferred payment sale and no taxable profit could arise under any theory until the taxpayer had received the return of her cost basis. The cost basis being in excess of \$700,000.00 and less than \$100,000.00 having been returned up to date including the taxable year of 1935, no possible taxable profit could have accrued to the taxpayer.

II.

Section 22 (b) (2) of the Revenue Act of 1934, in so far as it purports to include in the petitioner's gross income for the year 1935 any portion of the payments received by her from F. A. Gillespie and Sons Company pursuant to the contract of May 15, 1929, during the year 1935 is arbitrary, capricious, unconstitutional, and void and purports to impose a direct tax on capital without apportionment among the states, according to population and contravenes the provision of article I, section II, clause 3, and of article I, Section IX, clause 4, of the Constitution of the United States and the provisions of the Fifth Amendment thereto.

Under the treatment accorded the payment made by F. A. Gillespie and Sons Company during the year 1935 by both the Commissioner of Internal Revenue and the United States Board of Tax Appeals, the tax liability for the year of 1935 depends upon the validity of section 22 (b) (2) of the Revenue Act of 1935. The entire value of the property transferred by the petitioner, which was not less than one-half of the sum of \$1,464,240.22, or \$732,120.11, constitutes a consideration paid for the sums received and to be received by her; of which amount \$94,894.01 received by the petitioner up to and including December 31, 1935, will not equal the consideration paid under the agreement of May 15, 1929; and none of the payments received in 1935 would be taxable, unless section 22 (b) (2) of the Revenue Act of 1934 is valid.

Legislative history of section 22 (b) (2) of the Revenue Act of 1934 shows that the 3% basis was the adoption of an arbitrary rule.

Up until the enactment of the 1934 Revenue Act, payments received by annuitants from annuity contracts were not considered taxable until the entire cost or consideration paid for the annuities had been recovered by the annui-

tant. In the urge to secure additional revenue, Congress enacted section 22 (b) (2) of the Revenue Act of 1934, which purports to levy a tax upon annuities upon the theory that the receipt from all annuities are, as a matter of fact part interest and part return of capital. Congress adopted the arbitrary rule that 3% of the amount paid for the annuity should be deemed to be interest, and therefore income.

In the preliminary report of a subcommittee of the Committee on Ways and Means, "*Prevention of Tax Avoidance*," submitted under date of December 4, 1933, at page 13 there appears a statement with respect to annuities:

"PART II. *Minor Problems*—(1) *Annuities*. Section 22 (b) (2) of the Revenue Act of 1932 provides for taxing annuities, but not until the total amounts received exceed the total amount paid for the annuity.

"Your subcommittee is of the opinion that the tax on annuity receipts to the extent that they represent income should not be postponed as permitted by present law. Such receipts are, as a matter of fact part interest and part return of capital. Therefore, it is recommended that some amount representing the portion of the annuity receipts consisting of interest be made subject to the income tax. In order to facilitate administration, it is recommended that *an arbitrary rule be adopted that 3 per cent of the amount paid for the annuity shall be deemed to be interest. This rule is applied only to annuity contracts.*" (Italics ours.)

The report of the Committee on Ways and Means contains the following explanation of the purpose of the new 3% provision:

"Section 22 (b) (2). *Annuities, etc.* The present law does not tax annuities arising under contracts until the annuitant has received an aggregate amount of payments equal to the total amount paid for the annuity. Payments to annuitants are, in fact, based upon mortality tables which purport to reflect a rate of return suffi-

cient to enable the annuitant to recover his costs and in addition thereto a low rate of return on his investment. The change continues the policy of permitting the annuitant to recoup his original cost tax-free but requires him to include in his gross income a portion of the annual payments in an amount equal to 3 per cent of the cost of the annuity. *While the per cent used is arbitrary, it approximates the rate of return in the average annuity.* (Italics ours.)

“Statistics show that an increasing amount of capital is going into the purchase of annuities, with the result that income taxes are postponed indefinitely. The change merely places the return of this form of investment on the same basis as other forms of investment by taxing that portion of each payment which in fact constitutes income.”

The Senate report to accompany the Revenue Bill of 1934 had this to say about annuities:

“Section 22 (b) (2). *Annuities.* The present law does not tax annuities arising under contracts until the annuitant has received an aggregate amount of payments equal to the total amount paid for the annuity. Payments to annuitants are, in fact, based upon mortality tables which purport to reflect a rate of return sufficient to enable the annuitant to recover his cost, and in addition thereto, a low rate of return on his investment.

“The House bill continues the policy of permitting the annuitant to recoup his original cost tax-free but requires him to include in his gross income a portion of the annual payments in an amount equal to 3 per cent of the cost of the annuity. While your committee is in agreement with the change made by the House, it was thought advisable to continue the policy of not taxing any portion of payments received from an annuity until the aggregate amount of payments equal the total amount paid for the annuity in cases where the aggregate amount received by the annuitant from all his annuities is not more than \$500. * * *

Thus it can be seen that the enactment by Congress of this section of the law into the Revenue Act of 1934 was merely an "arbitrary rule" that was adopted by it that 3% of the amount paid for an annuity should be deemed to be interest and hence taxable income.

It is submitted to your honors that judicial notice should be taken of the well known situation prevailing at this time and that has prevailed for the last several years. The United States Government is able to borrow money for less than 2% and the assets of most insurance companies are largely invested in United States Government bonds of this character. Annuities paid by insurance companies as a matter of fact cannot be presumed to be derived 3% from earnings and the balance as a return of capital.

It is quite apparent from the congressional discussion had by the senators at the time of the adoption of the section that Congress had in mind to tax only *the income derived as a part of each annuity payment*. Three per cent was an arbitrary amount then fixed by Congress, it being said that most annuities were calculated upon a basis of mortality tables and a return of 3% on the amount paid in to the insurance company by the annuitant. A study of insurance companies and their computations were used in arriving at the basis set forth in section 22 (b) (2) of the act. Quoting Mr. Harrison from the Congressional Record, volume 78 at page 5847:

"Under the existing law no tax is imposed upon the recipient of an annuity until he has received back the entire amount paid for it. *Since an annuity represents in part interest upon the consideration paid, it seems fair to tax the annuitant currently upon the proportion of the annuity payment which represents interest*, and the bill so provides." (Italics ours.)

Mr. Reed stated at pages 5910-11, Congressional Record, volume 78:

“When insurance companies figure the amount that can be paid annually on annuity contracts, they calculate, *first*, the rental value of the principal during each year. Then, according to the expectancy of life of the individual, they compute how much of the principal can be returned to the annuitant, based on that expectancy. Their calculations involve, *first*, the interest on the money; *second*, return of principal during the balance of the probable life of the individual.

“In Great Britain the whole amount of such annuities is taxed as income. It did not seem fair to the Treasury—and this suggestion comes from the Treasury—to tax that part of the annuity which represents the return of principal, but it did seem fair, and it seemed to the committee that it would stop a most important loophole, to tax that part of the annuity which represents interest on the capital. That factor is generally computed by the insurance companies at 4 per cent, but obviously, since the principal is diminishing a little each year, it would be unfair to tax every year 4 per cent of the original principal, because that would be more than the remaining principal after the expiration of 2 years.

“Consequently the Treasury, in the effort to reach a fair mean, has fixed on the figure of 3 per cent. That is less than the interest return on the money in the early years, and it is probably more than the interest return toward the later years of the annuity. *That is the way the arbitrary 3 per cent was arrived at * * *.*” (Italics ours.)

Mr. Herbert said at page 5913 of the Congressional Record, volume 78:

“Then, there is another objection to the recommendation of the committee, as I see it. The bill provides that *the total premium shall be assumed to yield an income of 3 per cent*, and that such income shall be reported each year for tax purposes, and there is no provision for the reduction which takes place in that income from year to year, but the annuitant must report 3 per

cent of his entire premium throughout his life. Assuming that an annuitant has paid a premium of \$10,000 and received back a payment of \$1,000 per year, at the end of 10 years he has received back his \$10,000, and his entire principal is used up. Notwithstanding that, under the provision recommended by the committee, it is still assumed that the entire amount of the principal, \$10,000, is in existence, and he is required to report income of 3 per cent of that \$10,000." (Italics ours.)

Again at page 5915 of the Congressional Record, volume 78, Mr. Herbert observed:

"Suppose the Senator purchases for \$100,000 a home which he occupies himself. That \$100,000 will not yield him any income, but the Government has essayed to claim that a fair rental value of that house should be reported as income. The court said, 'No; that is not income. There has been no income. It is true that because the owner occupies his own home and does not have to pay rent elsewhere he saves that charge; but it is not income, and it is not income for tax purposes.' So in the case of the annuity the man deposits \$100,000 for a specific purpose. *It is not income for him to have paid back to him the sum which he deposits.* (Italics ours.)

"Suppose the payment shall stop, as it might well stop, after he had received his principal. Could there be said to have been any income there? Yet, in many many cases that is true. Not only is that true, but many times the payment stops before he has received back his principal, to say nothing about income."

At pages 5916 and 5918, Congressional Record, volume 78, Mr. Austin remarked:

"Suppose I have made a payment for an annuity today and receive but one annuity and then die; there is no provision in the bill whatever for a deduction on account of the large loss.

"If we take the example given by the Senator from Rhode Island, of the payment of \$100,000 in the pur-

chase of an annuity contract and a return of only \$10,000 and thereupon the death of the annuitant, we can readily see that there has been an absolute total loss of \$90,000, which is not recognized in any way whatever by this measure, although the entire theory of all our income-tax laws has been to recognize and to allow a deduction for actual realized losses.

“Mr. President, for these two reasons, *first, that this bill undertakes to tax a profit which is not yet realized*, and for the reason that it does not allow a deduction for a loss which is realized, *the measure is unjust and unfair, and ought not to be passed.* * * *

“It is true that when a person dies before the profits are realized his estate has suffered a loss. I made this statement previously, and I want to put into the record something which represents the opinion of the United States Board of Tax Appeals of very recent date.

“I refer to the case of Cora K. Louis, petitioner, against Commissioner of Internal Revenue, respondent, Docket No. 49179. Promulgated February 23, 1934.” (29 B. T. A. 1200.) (Italics ours.)

Mr. George stated, at page 5920 of the Congressional Record, volume 78:

“I know, and I have the utmost confidence that the courts will be able to say that *when an insurance company writes an annuity contract* and when citizen A or B or C buys that contract, both of them, contemplating the contract that is about to be purchased, figure on an increase over and above the actual money outlay for that contract, and, therefore, that the Government may properly say it will consider a small percentage—3 per cent, in this case—on the actual money spent for the contract as gross annual income, to be added to the income of the taxpayer for the purpose of taxation, if the particular taxpayer is liable to pay an income tax.” (Italics ours.)

It is submitted to Your Honors that the payments received under the terms of the contract do not come within

the purview of section 22 (b) (2) of the Revenue Act of 1934 and that no application of said section was ever intended by Congress with respect to payments made by virtue of a contract of the character here under consideration. Obviously it was the intent of Congress to attempt the levy of a tax upon annuities based upon 3% of their cost on the theory that an annuitant receives *at least* that rate of interest return on the amount paid for the annuity.

In this case, that cannot be true and the application of section 22 (b) (2) of the Revenue Act in the instant case would be an unconstitutional and unwarranted application and the taking of taxpayer's property.

Taxpayer turned over her portion of the property on May 15, 1929, to the corporation which had a value of not less than \$732,120.11. Up to the end of the year 1935, she had received \$94,894.01. At the rate of \$15,000 per year, petitioner would require the elapse of forty-three years in which to recover only her capital, taking into account no earnings whatsoever. Petitioner was a woman of 63 years of age in 1935 and would need to live to the ripe old age of 106 years to recover her capital. Such an attained age is a physical impossibility. Obviously, taxpayer can never receive 3%, nor even a fraction of a per cent of return on her investment. Such a contract was not under consideration by Congress and it was never intended by Congress to pass a law such as would lay a capital levy, as would be done in this case if Your Honors approve the decision of the Board of Tax Appeals.

A taxpayer may not be taxed upon some fictitious or hypothetical income basis nor upon something alleged by the Commissioner to be income which is in fact not income. *Richard v. Commissioner*, 111 F. (2d) 376; *Hillman v. Commissioner*, 71 F. (2d) 688, 14 A. F. T. R. 318.

No part of the payments received by taxpayer under the contract of May 15, 1929, constitutes income until the aggregate of the amounts received equals the cost or value of the property transferred and until then, the whole amount received constitutes a recovery of a portion of the taxpayer's capital.

Income, as used in the Sixteenth Amendment, has been considered by the Supreme Court in *Eisner v. Macomber*, 252 U. S. 189, 64 L. ed. 521:

“Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the *Doyle* case.”

In *Doyle v. Mitchell Bros.*, 247 U. S. 179, 62 L. ed. 1054, it was stated:

“In order to determine whether there has been gain or loss, and the amount of gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.”

The Board of Tax Appeals, in *Independent Life Insurance Company of America v. Commissioner*, 17 B. T. A. 757, at page 771, held as follows:

“There must be some sort of consummated pecuniary gain from which the tax can be paid.”

In the case of this taxpayer, there can be no gain until the entire cost is recovered. She had received the sum of \$94,894.01 up to December 31, 1935. The property which she delivered to the company pursuant to the contract had a value of not less than \$732,120.11.

This taxpayer was born June 9, 1872, and is now 69 years old. To recover the balance of her capital at the rate

of \$15,000.00 per year, she would need to live to the ripe old age of 106 years. The total amount which will be received depends entirely upon the length of the taxpayer's life and that is wholly unpredictable.* Until this taxpayer has actually received her total cost, it cannot be known whether she will ever do so and until it is reasonably certain that the capital will be recovered, then there certainly can be no gain. Therefore, a tax on any part of the amount received before the recovery of the total cost is a *tax on capital*.

Where the total amounts to be received are uncertain or contingent, the first payments are wholly a return of capital. *Commissioner of Internal Revenue v. Spire*, 77 F. (2d) 824; *Helvering v. Drier*, 79 F. (2d) 501; *Virginia Coal and Coke Company v. Commissioner*, 99 F. (2d) 919; *Florence M. Quinn v. Commissioner*, 35 B. T. A. 412; *Heiner v. Mellon*, 89 F. (2d) 141.

In *Thomas A. O'Donnell*, 25 B. T. A. 959, the taxpayer had sold his stock in an oil company for the right to receive a share of the subsequent net profits from the company's property, and at page 961, the Board said:

"It was a sale of property which might or might not give rise to income, depending upon the inscrutable factor of future oil production. If and when petitioner had received back his capital cost or base, income would begin to accrue. If such cost were never recovered, no income would ever arise. *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179."

In *Burnett v. Logan*, 283 U. S. 404, 75 L. ed. 1143, the Supreme Court in effect declared that the general rule above noted in the various cases applied to annuities. In the *Burnett* case, the taxpayer owned stock in a corporation which entitled her to receive a portion of the ore mined by another corporation. She sold her stock for cash, and in addition a

*Taxpayer has died since this appeal perfected.

promise by the buyer to pay in the future 60c per ton of ore received by it by virtue of its ownership of the stock.

The Commissioner held that the obligation of the buyer to make the tonnage payments had a fair market value at the time of the sale and should be treated as a closed transaction. The Commissioner's value of the buyer's obligation was based upon an estimate of ore reserves and an assumption that the total ore would be mined in equal annual quantities during the succeeding forty-five years. The Commissioner used that valuation as a basis for apportioning subsequent annual receipts between income and the return of capital.

The aggregate payments received by the taxpayer during the year involved included the original cash down payment and the subsequent tonnage payments were less than the cost basis of the stock sold. Taxpayer claimed that until the total amount actually received by her should equal her cost basis that no part of the payments was taxable. The Board of Tax Appeals upheld the Commissioner, the Circuit Court of Appeals, however, holding that it was impossible to determine the market value of the buyer's obligation and the taxpayer was entitled to the return of her capital before being charged with any taxable income. The decision of the Circuit Court was affirmed by the Supreme Court and it was said at page 412:

“As annual payments on account of extracted ore come in they can be readily apportioned first as return of capital and later as profit. The liability for income tax ultimately can be fairly determined without resort to mere estimates, assumptions and speculation. When the profit, if any, is actually realized, the taxpayer will be required to respond. The consideration for the sale was \$2,200,000.00 in cash and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense

equivalent to cash. It had no ascertainable fair market value. The transaction was not a closed one. Respondent might never recoup her capital investment from payments only conditionally promised. Prior to 1921 all receipts from the sale of her shares amounted to less than their value on March 1, 1913. She properly demanded the return of her capital investment before assessment of any taxable profit based on conjecture.

“ ‘In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.’ *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179, 184, 185.”

The Supreme Court evidently believed that the same plan should be applied to annuities for in the *Burnett* case, the court said, at page 414:

“If a sum equal to the value thus ascertained had been invested in an annuity contract, payments thereunder would have been free from income tax until the owner had recouped his capital investment. *We think a like rule should be applied here.*” (Italics ours.)

The obvious reason why payments under an annuity contract would have been free from income tax until the owner has recouped his capital investment is because until then such payments are wholly a return of capital and no part of them can constitute income.

All of the foregoing decisions holding that the first receipts are wholly exempt from tax until the recoupment of the capital did not rest upon specific exemption provisions of the revenue acts, but upon the inherent nature of the payments as a return of capital and not income.

Congress cannot transform capital into income by mere legislative fiat. *Eisner v. Macomber*, 252 U. S. 189, 64 L. ed. 521; *Burk-Wagoner Oil Association v. Hopkins*, 269 U. S.

110, 70 L. ed. 183; *Taft v. Bowers*, 278 U. S. 470, 73 L. ed. 460.

In *Taft v. Bowers*, the court said at page 481:

“Under former decisions here, the settled doctrine is that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment, something which theretofore could not have been properly regarded as income.”

The 3% provision of the Revenue Act causes the imposition of a tax on estimated average income without regard to actually taxing the capital of one annuitant in order to collect a tax on another annuitant's future income before its receipt. Previous revenue acts ultimately taxed all income received from annuities. The 3% provision of the 1934 Revenue Act likewise taxes all income received in excess of cost, *by those who recover their total cost*; however, the new provision also taxes part of the annuity payments received by those annuitants who never recover their cost.

In the case of this taxpayer she would never be permitted to recover *any part* of her cost if the contention of the Commissioner of Internal Revenue be approved by this Honorable Court. The Commissioner says that because 3% of the cost is in excess of the amount received that the entire amount is taxable. A fallacious argument indeed! By this treatment there is proposed a levy upon capital, a direct tax and not an income tax.

The supposed evil that Congress was attempting to remedy in the new provision was not that any income from annuities formerly escaped taxation, but merely that the collection of the taxes was postponed until the income was determined and received. Quoting from “*Prevention of Tax Avoidance*,” *supra*:

“Your Committee is of the opinion that the tax on annuity receipts to the extent that they represent in-

come, *should not be postponed, as permitted by present law.*" (Italics ours.)

Solely in order to prevent this delay in the collection of the tax from those annuitants who will subsequently receive income, Congress now attempts to tax all annuitants regardless of their cost, or regardless of their situation. Many of these will never receive any income whatever. The estimated average rate (estimated in the year 1933) of income from annuities is made an arbitrary minimum rate, without any corresponding maximum.

This is analogous to taxing all men who are seven feet tall on the basis of the income received by one as a side-show freak, on the theory that all men seven feet tall are freaks and ought to receive the same as some selected member of the group; or taxing all persons who have \$100,000.00 worth of property on the basis of \$3,000.00 per annum on the theory that at least each ought to secure a 3% return per annum on his capital, irrespective of the type of investment, the management ability of each, or the time expended in managing the investment.

We believe that it would be conceded that such a tax would be unconstitutional and void and not within the purview of the Sixteenth Amendment. The effect of the change in the 1934 Act is not only to advance the time of the collection of the tax from future income before the income is received but also to tax a portion of the annuity payments where no income will ever be received. Income tax cannot be imposed on prospective income.

The law contemplates that it be either accrued or received, actually or constructively. Otherwise no tax can attach. Income tax may not be imposed on the basis of average income received by all taxpayers, but only upon the income which the particular taxpayer has in fact received.

In *Hoeper v. Tax Commissioner*, 284 U. S. 206, 76 L. ed. 248, the court said:

“We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person’s property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer’s income cannot be made such by calling it income. Compare *Nichols v. Coolidge*, 274 U. S. 531, 540.”

In the 1934 Revenue Act, Congress is attempting to measure the tax on one annuitant’s income by reference to the income of another annuitant.

The fact that a large amount of capital may have been disposed of in such a manner that the receipt therefrom is postponed, does not authorize or empower Congress to retaliate by taxing that capital on an assumed or fictional basis. If the purchase of annuities postponed the receipt of income from that capital, the collection of an income tax must necessarily be postponed until some actual income is determined and received. Congress cannot tax income which might have been, but was not actually received or accrued. The power which Congress attempts to exercise in this 3% provision has never before been upheld. If this principle is now sustained, where will its application stop?

Your Honors will take judicial notice that a vast storehouse of capital is lying idle in banks, producing no income. The Treasury is thus deprived of taxes on the income which that capital might produce if invested. Can Congress require that 3%, or any percentage, of all idle funds be included in gross income on the theory that that amount approximates the rate of return from the average investment of capital?

The Supreme Court has rejected the theory that income tax can be imposed upon the average basis or upon a conjectural basis in order to avoid delay in its collection. In *Burnett v. Logan, supra*, the court said:

“As annual payments on account of extracted ore come in, they can be readily apportioned first as return of capital and later as profit. The liability for income tax ultimately can be fairly determined without resort to mere estimates, assumptions and speculation. *When the profit, if any, is actually realized, the taxpayer will be required to respond.*” (Italics ours.)

It is submitted to Your Honors that until this taxpayer has received her cost that no income has been received, either actually or constructively, nor has any accrued, and therefore there is nothing upon which the income tax statute can operate. The argument of the Commissioner of Internal Revenue certainly cannot bear close scrutiny that the full amount of \$17,666.25 received by this taxpayer is taxable for the reason that it is less than 3% of the amount paid to the company by virtue of the contract of May 15, 1929.

In other words, the Commissioner of Internal Revenue in effect is saying that if a taxpayer makes a bad deal, which results in no profit, that he is to be taxed regardless, because he should have made a deal which should have resulted in profit, in order that the income tax law might become operative and the Treasury collect some tax.

In the case of *F. A. Gillespie v. Commissioner*, 38 B. T. A. 673, with respect to the 3% of the cost of an annuity being considered as income, in reply to the contention that it was an unreasonable allocation, Member DISNEY said that it conformed to “*what the legislative body believed to be the income ordinarily realized by the annuitant.*” (Italics ours.)

If this be the measure of the authority of Congress to legislate for fiscal purposes, then indeed all constitutional

restraint has gone with the wind and we have neither rules nor land-marks by which to be guided, except what the legislative body at any given time believes to be the average income ordinarily received by a taxpayer.

If the Commissioner of Internal Revenue is correct in his interpretation of section 22 (b) (2) of the Revenue Act of 1934 and Congress had the constitutional authority to enact that statute, then the Commissioner of Internal Revenue is acting in an arbitrary and capricious manner when he proposes to assess a tax upon an income of less than the 3% provided.

In the instant case, the Commissioner proposed to include the sum of \$17,666.25 in taxpayer's gross income, whereas 3% of the value of the property turned over to the corporation would be not less than \$21,963.60. If the Commissioner of Internal Revenue has authority to reduce the amount taxable to less than 3% of the cost, then he is arrogating unto himself legislative authority. An anomalous situation, indeed, where the taxpayer is assessed upon income of more than the gross amount actually received.

It is submitted to Your Honors that Congress had no intention of delegating authority to the Commissioner of Internal Revenue to juggle taxpayer's gross income about to please himself. Neither did Congress have in mind to tax, under section 22 (b) (2) of the Revenue Act of 1934, payments made pursuant to a contract of the character involved in this case. Conceding that section 22 (b) (2) of the Revenue Act of 1934 may be constitutional, the manner in which the Commissioner of Internal Revenue has sought to impose income tax upon this petitioner is arbitrary and capricious and not within the purview of section 22 (b) (2). If Your Honors hold that the Commissioner's act is within the purview of section 22 (b) (2) of the Revenue Act of 1934, then in the present case, that section is unconstitutional in so far

as it attempts to levy an income tax upon this taxpayer with respect to the amount received during the calendar year 1935 by virtue of the terms of the contract of May 15, 1929.

A provision of a Revenue Act, attempting to impose an income tax on capital, contravenes the provisions of article I, section 2, clause 3, and of article I, section 9, clause 4, of the Constitution of the United States; and a provision attempting to impose a tax upon the basis of averages, or of speculation and conjecture, without regard to actualities, is arbitrary and capricious, and contravenes the due process clause of the Fifth Amendment.

In *Eisner v. Macomber*, 252 U. S. 189, 64 L. ed. 521, holding that a provision of a revenue act imposing an income tax on stock dividends was unconstitutional as a tax on capital not apportioned among the states, the court said, at page 205:

“The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the amendment was adopted. In *Pollock v. Farmers Loan & Trust Co.*, 158 U. S. 601, under the Act of August 27, 1894, C. 349, paragraph 27, 28 Stat. 509, 553, it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arise, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the states according to population, as required by Art. I, section 2, clause 3, and section 9, clause 4, of the original Constitution.

“Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the Sixteenth Amendment was adopted, in words, lucidly expressing the object to be accomplished: ‘The Congress shall have power to lay and collect taxes on

incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.' As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which might otherwise exist for an apportionment among the states of taxes laid on income. *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 17-19; *Stanton v. Baltic Mining Co.*, 240 U. S. 103, 112, *et seq.*; *Peck & Co. v. Lowe*, 247 U. S. 165, 172-173.

"A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts."

The 3 per cent provision of section 22 (b) (2) of the 1934 Act imposes a tax on capital not apportioned among the states and is therefore unconstitutional.

The 3 per cent provision is also capricious and arbitrary, and contrary to the Fifth Amendment.

In *Schlesinger v. Wisconsin*, 270 U. S. 230, 70 L. ed. 557, the court said, on page 240:

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against 'B.' Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is for-

bidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.”

In *Heiner v. Donnan*, 285 U. S. 312, 76 L. ed. 772, in holding unconstitutional a provision of a revenue act taxing every transfer made within two years before death, as a gift made in contemplation of death, without regard to the facts, the court said, on page 325 :

“A statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment.

“Nor is it material that the Fourteenth Amendment was involved in the *Schlesinger* case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Coolidge v. Long*, 282 U. S. 582, 596. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment is settled. *Nichols v. Coolidge*, 274 U. S. 531, 542; *Brushaber v. Union Pac. R. Co.*, 240 U. S. 1, 24-25; *Tyler v. United States*, *supra*, p. 504.”

After discussing the effect of the statutory provision in question, the court further said, on page 327 :

“Plainly, this is to measure the tax on A’s property by imputing to it in part the value of the property of B, a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and a denial of due process of law. Such an exaction is not taxation but spoliation. ‘It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.’ *United States v. Railroad Co.*, 17 Wall. 322, 326.”

Similar expressions are contained in *Nichols v. Coolidge*, 274 U. S. 531, 542, 71 L. ed. 1184, and *Hoeper v. Tax Commission*, 284 U. S. 206, 215, 76 L. ed. 248.

From the foregoing decisions it is plain that Congress had no power to tax the petitioner, nor to delegate to the Commissioner of Internal Revenue the authority to compute a fictional basis for taxation, upon the assumption that she received income at an arbitrary rate "approximating the rate of return in the average annuity," without regard to the actual facts.

III.

In any event no more than \$15,000.00 was received by Maud Gillespie during the year 1935 from F. A. Gillespie and Sons Company under the terms of the contract of May 15, 1929, the remaining amount, \$2,666.25, being a loan to the taxpayer from F. A. Gillespie and Sons Company.

In the letter of final determination sent to the taxpayer by the Commissioner of Internal Revenue, under date of March 2, 1939 (R. 10), it was determined by the Commissioner that the taxpayer received during the taxable year 1935 the sum of \$17,666.25 from annuities.

The Board held in its decision that the taxpayer acquired two annuities, one paying \$15,000.00 and the other, \$10,000.00, per annum, and that the \$10,000.00 per annum annuity had been turned back to the company by the letter agreement of November 16, 1933 (R. 118), which was effective during the year 1935.

Having thus concluded that the Commissioner was in error in his determination, it was then incumbent upon the Board to determine from the evidence the correct amount received by the taxpayer under the contract of May 15, 1929. Thus, the Board having concluded that the Commissioner was in error, there was no presumption attaching to any part of the determination of the Commissioner that his determination was correct.

If the petitioner's evidence goes so far as to show clearly and distinctly a determinating fact which establishes that the Commissioner's determination is incorrect and the proofs remain unchallenged, there is no presumptive validity of the Commissioner's rulings. *O'Rear v. Commissioner*, 80 F. (2d) 473; *Mount v. Commissioner*, 48 F. (2d) 550; *Lunsford v. Commissioner*, 62 F. (2d) 741; *Helvering v. Taylor*, 293 U. S. 507, 55 S. Ct. 287.

In the *Lunsford* case, the court said:

"We have repeatedly held that the taxpayer has made out his case when he has put in proofs, 'clearly and distinctly tending to show' a determinating fact. *Rookwood Pottery Company v. Commissioner*, (C. C. A.) 45 F. (2d) 43; *Pioneer Pole and Shaft Company v. Commissioner*, (C. C. A.) 55 F. (2d) 861. The presumption that the Commissioner is right is procedural and cannot survive such proofs unless they are challenged by contrary proofs, or destructive analysis, and we have gone so far as to say that the taxpayer's affirmative evidence may itself contain the necessary challenge and furnish the material for such analysis. *Crowell v. Commissioner*, (C. C. A.) 62 F. (2d) 51, decided December 6, 1932. There is nothing of that sort here. There are no contrary proofs, and no reasonable inference can be drawn from the taxpayer's proofs to support the respondent's position. The record is clear that the payment to the taxpayer was a gift. The holding of the Commissioner and the Board to the contrary is clearly arbitrary, and must be set aside."

In the *Helvering v. Taylor* case, the Supreme Court, speaking through Mr. Justice BUTLER, stated:

"We find nothing in the statutes, the rules of the Board or our decisions that gives any support to the idea that the Commissioner's determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing or, if liable at all, shows the correct amount. While decisions of the lower courts may not be harmonious, our

attention has not been called to any that persuasively supports the rule for which the Commissioner here contends.

“Unquestionable the burden of proof is on the taxpayer to show that the Commissioner’s determination is invalid. *Lucas v. Structural Steel Co.*, 281 U. S. 264, 271, 50 S. Ct. 263, 74 L. ed. 848; *Wickwire v. Reinecke*, 275 U. S. 101, 105, 28 S. Ct. 43, 72 L. ed. 184; *Welch v. Helvering*, 290 U. S. 111, 115, 54 S. Ct. 8, 78 L. ed. 212. Frequently, if not quite generally, evidence adequate to overthrow the Commissioner’s finding is also sufficient to show the correct amount, if any, that is due. See, e. g., *Darcy v. Commissioner*, (C. C. A.) 66 F. (2d) 581, 585. But, where as in this case, the taxpayer’s evidence shows the Commissioner’s determination to be arbitrary and excessive, it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him.”

Miss Ruth Reynolds, assistant secretary of F. A. Gillespie and Sons Company, testified (R. 125) that in 1935 the company paid Mrs. Gillespie the sum of \$15,000.00 on the contract and \$2,666.25 as a loan. On cross examination, the nature of this payment was most clearly brought out by the attorney for the Commissioner. The testimony on cross examination at R. 140 being as follows:

“By Mr. Anderson:

Q. You stated on direct examination that Mrs. Gillespie received from Gillespie & Sons \$17,666.25 during 1935, the year at issue here, of which amount \$2,666.25 represented a loan. Does the corporation’s records disclose that this amount is a loan outstanding? In other words, is it listed as a loan receivable or an account receivable on the corporation’s books?

A. It is not.

Q. What is the basis for your statement that this amount was a loan?

A. The information given me by Mr. P. A. Gillespie at the time the money was advanced.

Q. Who was P. A. Gillespie?

A. P. A. Gillespie is vice-president, under whom I work.

Q. What did he tell you?

A. He told me Mrs. Gillespie had a note in the amount of \$2,500, and interest of \$166.25, which had to be met, and she desired the company to advance the money to pay that in the nature of a loan.

Q. The corporation has no record on its books that this was a loan?

A. Except a notation in their ledger.

Q. Who made that notation?

A. I did.

Q. Pursuant to Mr. Gillespie's instructions?

A. Yes.

Q. Did Mrs. Gillespie give a note for that loan?

A. No.

Q. Or any security?

A. No.

Q. Did it provide for any interest?

A. No, sir.

Q. Did she ever pay any interest?

A. No, sir.

Q. Has the loan ever been repaid?

A. No, sir.

Q. Up to this time?

A. Not to this time.

Mr. Anderson: That is all.

Mr. Rorschach: That is all."

Mrs. Maud Gillespie, the petitioner, testified in her deposition (R. 69):

"Mr. Rorschach: Q. And how much did the company pay you in the year 1935?

A. \$17,666.25.

Q. Now, under this amended agreement the company was obliged to pay you \$15,000.00 for the year 1935. Can you explain the additional \$2,666.25 that was paid you in 1935 by the company?

A. Well, I had a mortgage on a building in Hollywood and I didn't have the money to pay it off so they lent me the money to pay that mortgage off.

Q. And what was the amount of that that they let you have?

A. Well, they let me have \$2,666.25."

It is submitted to Your Honors that the Board having found that the Commissioner of Internal Revenue erred in his determination, then it left the Commissioner's determination without any presumptive validity in any respect and it then became necessary for the Board to determine from the evidence and the facts taxpayer's correct tax liability for the year 1935. The only evidence before the Board was that of petitioner's witness Miss Reynolds, in which she testified on both direct and cross examination that the \$2,666.25 was a loan to Mrs. Gillespie and was so shown on the ledger of the company's books and the testimony of the petitioner.

The fact that Mrs. Gillespie had a contract with the corporation was presumed by the Board to warrant the assumption that the loan was in fact not a loan but a payment on account of the contract. We say that this is stretching the presumptive correctness of the Commissioner's determination. As was said in *Mount v. Commissioner*, *supra*:

"There must be a limit beyond which the presumptive correctness of the Commissioner's determination may not be stretched in order to defeat a taxpayer. On the facts appearing in this record, the burden which the taxpayer carried of establishing that there was no fair market value for his share was sustained."

It is submitted to Your Honors that no evidence was introduced before the Board upon which the Board could find other than that the sum of \$2,666.25, received by the taxpayer during the year 1935, was a loan. The petitioner made out her case and no further duty rested upon her to offer testimony with respect to an issue in which the burden of proof then rested upon the Commissioner.

It was held by the Board in *Rainbow Gasoline Corporation v. Commissioner*, 31 B. T. A. 1050, that the failure to establish an interest deduction for the years 1928 and 1929 for which the Commissioner had contended in his letter of determination and which the Board sustained did not warrant the presumption that the deficiency should be increased by the disallowance of an interest deduction for the year 1930, claimed by the respondent at the time of trial. There was no proof on the part of the Commissioner with respect to the increased deficiency claimed for the year 1930, even though there was no proof that any interest was in fact ever paid. In that case, the Board said:

“At the hearing respondent also claimed such increase in the deficiency for 1930 as would result from the inclusion in petitioner’s income for that year of the amount of \$1,635.23 allowed as a deduction for accrued interest, on the ground that there was no legal liability on the part of the petitioner to pay interest on the account of the Henderson Company, and hence the deduction for accrued interest in 1930 had been erroneously allowed.

“In support of its contentions, petitioner offered the testimony of its general auditor to the effect that in December, 1930, interest was accrued on the books on the average balance of the Henderson Co. account for each of the years 1928, 1929 and 1930 pursuant to the instructions of the general manager of the petitioner corporation.

“The issue joined by the pleadings of the parties

filed prior to the hearing having raised specifically the question whether there was any legal obligation on the part of the petitioner to pay interest on the account of the Henderson Co., the mere proof of accrual on the books of the petitioner is insufficient, we think, to establish the liability, respondent's contention being that the accrual was erroneous because of the lack of legal obligation to pay. There is no proof that any interest was in fact ever paid, nor that the petitioner was legally liable to pay interest, or, if so, at what rate, nor that the general manager of petitioner was authorized to direct the accrual, and it appears that no interest was accrued for 1928 or 1929 until in December, 1930. In these circumstances the interest deduction claimed by the petitioner for 1928 and 1929 must be disallowed for lack of proof.

“Petitioner further contends that in any event the increased deficiency for 1930 claimed by respondent must be denied for the reason that the burden was upon respondent to prove that the allowance of the deduction for that year was erroneous, and no proof on this point was offered by respondent.

“In the situation presented here, we think that petitioner's argument is sound. *No duty rests upon the petitioner to offer testimony with respect to an issue on which the burden of proof rests on the respondent.* The presumption was that what had been done by the Commissioner was correct. No testimony was offered to show that it was not. We therefore hold that the revisions in deficiencies asked for by respondent should not be allowed.” (Italics ours.)

IV.

In the alternative, if any part of the sum of \$15,000.00 received by Maud Gillespie from F. A. Gillespie and Sons Company during the year 1935 was taxable, then only such portion of the \$15,000.00 is taxable as represents 3 per cent of what an annuity would have cost on May 15, 1929, as would have produced the sum of \$15,000.00 per annum during the lifetime of Maud Gillespie.

The Board held that the petitioner on May 15, 1929, agreed to the transfer of certain properties to F. A. Gillespie and Sons Company and, as part consideration, the company agreed to pay the petitioner two annuities to pay the sum of \$15,000.00 per year for life and \$10,000.00 per year for life (R. 142 and 146).

The Board found, further, that the conveyance of the property by petitioner was made for two purposes, namely: *First*, as the purchase of a specified annuity to herself during her life; *second*, the remainder over as a gift of the excess of the value of such properties over the cost of acquiring the annuities for the benefit of her children and her grandchildren (R. 146). The Board further found (R. 148) that the petitioner on November 16, 1933, agreed to the suspension of the guaranteed dividend payment of \$10,000.00 annually (R. 118). During the years 1935 and the other years up to and including the date of the hearing nothing had been paid on the guaranteed dividend payment (R. 148) and the petitioner donated back to the company all of these payments.

Testimony by the petitioner at R. 67 is as follows :

“Q. Now, this contract of May 15, 1929, by which you were obliged to turn over this property to the company, did you turn over the property and execute the deeds and documents and conveyances and all the matters that pertained to the dividends of \$10,000.00 a year?

Have you made any change with respect to those payments, or any amendment to that contract?

A. Yes, I have.

Q. Do you recall the nature of that change?

A. Well, I was receiving—shall I tell you the amount I was receiving at that time?

Q. Yes.

A. I was receiving \$15,000.00 a year in monthly payments and at the end of the year \$10,000.00, I suppose in the nature of a dividend, and I turned back the \$10,000.00 to the company for investment provided that Mr. Gillespie would do the same thing.

Q. And has that agreement been carried out?

A. Yes, it has.”

Maud Gillespie could have purchased from a reputable life insurance company doing business in the United States an annuity which would have paid her the sum of \$15,000.00 per year for life on May 15, 1929, for the sum of \$196,537.50 (R. 149). An annuity could have been purchased by Maud Gillespie from a life insurance company doing business in the United States on May 15, 1929, which would have paid her \$10,000.00 per year for life for \$131,025.00; or the two annuities totaling \$25,000.00 could have been purchased for \$327,562.50 (R. 150).

If any portion of the \$15,000.00 received by Maud Gillespie from F. A. Gillespie and Sons Company during the taxable year 1935 is taxable, then only so much is taxable as represents 3 per cent of the cost of acquiring an annuity from a reputable life insurance company on May 15, 1929, which would have paid Maud Gillespie the sum of \$15,000.00 per annum for life.

The Board held that Maud Gillespie should be taxed on both annuities for the year 1935, even though she was only receiving payment under one of them. What an anomalous situation! If a taxpayer had ten annuities that had cost him

\$100,000.00 each and was only receiving payment of, say, \$5,000.00 a year under one of the annuities and nothing from the other nine, then under the theory propounded by the Board, the taxpayer would be required to pay three per cent of the cost of the ten annuities, or \$30,000.00, although he had received only \$5,000.00 from the one annuity.

The Board found that it was Mrs. Gillespie's intention to make a gift or contribution of the excess value of the properties to the corporation for the benefit of her children or grandchildren. Obviously it was her intention, and the Board so finds (R. 148), to make a contribution of the \$10,000.00 annual payment for at least a period of three years, beginning November 16, 1933.

The Member in his opinion concedes the donative intent of the petitioner in donating to the corporation and to her children and grandchildren the remainder of the value of the property over the cost of the so-called annuities as a gift or contribution for the benefit of these children or grandchildren. Would it not be just as reasonable to perceive the donative intent of the petitioner in her amendment to the contract of May 15, 1929, on November 16, 1933? If she was donating property in excess of the cost of two annuities, one for \$15,000.00 and one for \$10,000.00, on May 15, 1929, could she not just as reasonably donate the payment or the additional value of the so-called \$10,000.00 annuity in 1933 when she entered into the new agreement relieving the company of the \$10,000.00 dividend guarantee?

With respect to the property turned over to the corporation, Mrs. Gillespie made this statement (R. 71) :

“Oh, yes, surely, I turned this over so that my sons and my grandchildren would benefit by it.”

Again, at R. 72, she stated:

“Well, I figured that was turned into the company for the benefit of my children and my grandchildren.”

At R. 73 she stated:

“Well, I made—I gave my property to the company to safeguard my children and my grandchildren.”

After the payments were made to her during her lifetime, it was Mrs. Gillespie's intention to consider the remainder over as a gift or contribution to the corporation for her children and grandchildren. Upon being asked this question (R. 73):

“And did you consider the remainder over the value of this property as a gift or contribution to your children?”,

she replied:

“It was just a gift to my children and my grandchildren.”

In *Ellerson v. Grove*, 44 F. (2d) 493, the Circuit Court said that a gift is a voluntary transfer of property without consideration and that the elements necessary to validate a gift are the donor's intent, delivery and acceptance by the donee. At page 496, the court said:

“A ‘gift’ is a voluntary transfer of property from one to another without consideration. To validate it, three things are necessary: Donor's intention, delivery of the article, and acceptance by donee. Where a gift is consummated, it is as valid in law as anything else. *Farrington v. Tennessee*, 95 U. S. 679, at page 683, 24 L. ed. 558.”

The gift of a portion of the property is to be inferred from the fact which is stipulated, that the property transferred by the petitioner to F. A. Gillespie and Sons Company under the contract of May 15, 1929, far exceeded the cost of purchasing an annuity. *G. Wildy Gibbs*, 28 B. T. A. 18; *Anna L. Raymond*, 40 B. T. A. 244; *May Rogers*, 31 B. T. A. 994.

It is therefore submitted to Your Honors that assuming, but not admitting, that the 1935 receipts was not in the

nature of a deferred payment on a sale and that section 22 (b) (2) of the Revenue Act of 1934 is constitutional, then the taxpayer could be taxed no more than three per cent of the cost of an annuity purchased on May 15, 1929, which would produce \$15,000.00 per year. The Board found that the cost of such an annuity would have been \$196,537.50 and that petitioner's taxable income from that source for the year 1935 would be three per cent of that amount, or \$5,896.12, plus the sum of \$2,666.25, which the Board held not to be a loan.

It is insisted that there is no basis under section 22 (b) (2) of the Revenue Act of 1934 upon which to tax the taxpayer upon the alleged cost of an annuity when she received nothing from the annuity. Conceding that the taxpayer purchased two annuities, there is no authority under section 22 (b) (2) of the Revenue Act of 1935 which permits the Commissioner of Internal Revenue to exact a tax from the taxpayer based upon the so-called purchase of an alleged annuity, when the taxpayer receives nothing from that "annuity" during the taxable year.

Conclusion.

In conclusion, the taxpayer rests her case upon the following points and cases cited in the brief in support of same:

I.

The Board erred and should have found that the payment made to Maud Gillespie in the calendar year 1935 by virtue of the terms of the contract of May 15, 1929, was an agreement for sale and was on the basis of a deferred payment and no taxable gain was realized until the cash payments exceeded the cost. F. A. Gillespie and Sons Company was an oil company and was not in the insurance business nor licensed under the laws of the State of Oklahoma to engage in the insurance business or in the business of grant-

ing annuities. If the contract is construed to be an annuity, then F. A. Gillespie and Sons Company has violated the laws of the State of Oklahoma and the contract is void. The presumption is in favor of supporting the validity of the contract; hence, the only construction that can be placed upon the contract is that of an agreement for sale. The cost of the property conveyed by Mrs. Gillespie in 1929 being in excess of \$700,000.00 and less than \$100,000.00 having been received up to January 1, 1935, there could be no gain arise out of the receipt of \$15,000.00 by taxpayer during the year 1935.

II.

Section 22 (b) (2) of the Revenue Act of 1934 is unconstitutional and void if it be held to have any application in the instant case, for the reason that the three per cent provision is an arbitrary rate and in the case of this taxpayer imposes a tax on capital not apportioned among the states.

III.

The Board erred in finding that \$2,666.25 was not a loan to taxpayer from F. A. Gillespie and Sons Company. There is no evidence to support any other finding.

IV.

In the alternative, if any part of the sum of \$15,000.00 received by Maud Gillespie from F. A. Gillespie and Sons Company during the year 1935 was taxable, then only such portion of the \$15,000.00 is taxable as represents three per cent of what an annuity would have cost on May 15, 1929, as would have produced the sum of \$15,000.00 per annum during the life of Maud Gillespie. The Board found as a fact that two "annuities" had been acquired by Maud Gillespie, one for \$15,000.00 per year and one for \$10,000.00 per year, and that the \$10,000.00 per year annuity had been donated back to the company by a supplemental contract of November 16, 1933. The Board and the Commissioner of Internal

Revenue are without authority to find an assessment against the taxpayer based upon an annuity from which the taxpayer received nothing during the year 1935. Section 22 (b) (2) of the Revenue Act of 1934 does not authorize such an exaction, if it be conceded that it is constitutional, and our attention has not been called to any other section of the Revenue Act which authorizes any such exaction. The rule which should be applied in this case has been well stated by Lord CAIRNS and has been restated in many federal tax decisions, *Partington v. Attorney General*, L. R. 4 H. L. 100, 122:

“I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because as I understand the principle of all fiscal legislation, it is this: If a person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.”

All of which is

Respectfully submitted,

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No. 9883

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**PARMER A. GILLESPIE, EXECUTOR, ESTATE OF MAUD
GILLESPIE, DECEASED, PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS**

BRIEF FOR THE RESPONDENT

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FILED

JAN - 5 1942

PAUL P. O'BRIEN,
CLERK

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OPINION BELOW

The only previous opinion in the present case is that of the United States Board of Tax Appeals (R. 142), which is reported in 43 B. T. A. 399.

JURISDICTION

The appeal in this case involves income taxes for the year 1935 in the amount of \$549.76, and is taken from a decision of the Board of Tax Appeals entered on March 20, 1941. (R. 160.) The case is brought to this Court by a petition for review filed on June 19, 1941 (R. 161-166), pursuant to Sections 1141 and 1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

In 1929 when the taxpayer was 57 years old she and her husband entered into an agreement with a corporation, whereby they transferred property which they owned jointly with a value of about \$1,400,000, in part consideration for which the corporation agreed to pay her \$15,000 per year for life and guaranteed to her also that she should receive annually as dividends an amount equal at least to \$10,000. The amount a reputable life insurance company would have charged her for an annuity of \$25,000 is \$327,000, which the Board decided was the cost of the annuity. The questions presented are:

1. Whether the agreement between the taxpayer and her husband, on the one side, and the corporation on the other was a contract of sale or a contract for an annuity.

2. If the contract was for an annuity, whether \$327,000 represented the cost of the annuity.

3. Whether Section 22 (b) (2) of the Revenue Act of 1934, as applied to the facts of this case, violates the Fifth and Sixteenth Amendments.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 23-26.

STATEMENT

The facts, some of which were stipulated, as found by the Board of Tax Appeals (R. 144-150), are substantially as follows:

Taxpayer was an individual residing at 712 North Roxbury Drive, Beverly Hills, California. She was born on June 9, 1872,¹ and was married to Frank A. Gillespie, born August 27, 1868, in 1892. They had three sons, B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, and six grandchildren. (R. 144.)

On April 4, 1920, F. A. Gillespie & Sons Company, a corporation, hereinafter called the company, was organized under the laws of Oklahoma, with a capital stock of \$1,000,000, divided into 10,000 shares of the par value of \$100 each. The shares were issued 9,980 to F. A. Gillespie and five each to taxpayer and B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie. By an instrument executed on February 9, 1921, F. A. Gillespie, in consideration of the fact that equitable title to some of the properties transferred to the company for the issuance of its stock to him had theretofore been conveyed to taxpayer and B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, thereby declared that he held 9,975 of the shares of the company in trust in equal shares for the four named individuals and F. A. Gillespie. The trust term was limited to the life of the last surviving beneficiary and the corpus was made distributable among the surviving children or grandchildren of taxpayer and F. A. Gillespie or among their heirs. (R. 144.) The beneficiaries were entitled to receive currently all dividends paid on the stock and accretions thereto. On the death of tax-

¹ After petition for review of the Board's decision had been filed in this Court taxpayer died in September 1941. Parmer A. Gillespie, her executor, was substituted as petitioner by order of this Court in October 1941.

payer or F. A. Gillespie within the trust period, the surviving children were to become entitled to the current distributions and on their death similarly within the term of the trust this right was to pass to the grandchildren. The trustee was given broad powers of management and investment, and surviving trustees were designated (R. 144-145).

Taxpayer and F. A. Gillespie on May 15, 1929, entered into two agreements by the first of which, after reciting that they were living separate and apart and wished to settle their rights in their properties, they agreed mutually on the disposition of the property which they owned jointly and released each other reciprocally of all claims for support or inheritance. With the exception of certain personal and real property which was set aside for the contractors individually, the bulk of the property, it was agreed, was to be conveyed to the F. A. Gillespie & Sons Company. By the terms of the second agreement, which was executed by taxpayer, F. A. Gillespie, and the company, the two first named conveyed to the company the following property, of the values indicated, which they owned jointly (R. 145):

U. S. First Liberty Loan bonds and Port of New Orleans,	
Louisiana, state bonds.....	\$1, 172, 000. 00
Empress Building, Tulsa, Oklahoma.....	150, 000. 00
Sundry lands and lots located in Oklahoma.....	22, 512. 00
Cash and accounts receivable.....	94, 365. 22
Sundry stocks.....	25, 363. 00
Total.....	\$1, 464, 240. 22

The cost of the above property to F. A. Gillespie and taxpayer equaled or exceeded the above fair market value (R. 146).

As part consideration for the conveyance of these properties the company agreed to pay to F. A. Gillespie and taxpayer, each respectively, the sum of \$15,000 per year for life and guaranteed to taxpayer, in addition, that she should receive annually as dividends an amount equal at least to \$10,000. If funds were not available for the declaration of dividends in this amount, the company agreed to pay such sum to the taxpayer. F. A. Gillespie agreed in addition that he would not sell any of the shares of the company which he held in trust without the consent of a majority of the company's directors (R. 146).

The conveyances of property by taxpayer to F. A. Gillespie & Sons Company in accordance with such tripartite agreement were made for two purposes, namely, first, as a purchase of the specified annuity to herself during her life, to the extent of the fair cost thereof, and, secondly, as a gift of the excess of the value of such properties over such cost for the benefit of her children and grandchildren (R. 146).

At a meeting of the board of directors of the company duly called on February 18, 1932, the contract executed by the company on May 15, 1929, under which the parties had been acting, was adopted and ratified in view of the fact that "the acquisition by this Company of the properties and assets referred to in said contract are [sic] of great value and largely in excess of the amounts provided to be paid under the terms of said contract by this corporation." It was acknowledged by further resolution of the directors that the company had received all the properties agreed to be transferred to it under the contract (R. 146-147).

On the same date, February 18, 1932, deeds transferring the realty identified above as the Empress Building, and the Gillespie residence in Tulsa, included above in sundry Oklahoma lands, were executed to the company. A final deed covering lands agreed to be conveyed in Oklahoma was executed on June 25, 1934 (R. 147).

During the year 1932 taxpayer and the company became involved in certain litigation in which the company asserted a claim for debt against taxpayer in the amount of \$17,845.05. This controversy was settled by the taxpayer's agreement to pay the company one-half of this claim, less certain minor deductions, out of the \$10,000 which should become due to her from the company on May 15, 1932, and by the transfer to the company of certain realty in Santa Monica, California, owned by taxpayer. The company agreed to pay to taxpayer at once \$10,000 owed by it under the contract less \$2,000 for attorney's fees and \$2,000 already paid to taxpayer (R. 147).

On June 22, 1932, certain lots of real property of undetermined value owned by taxpayer and located in Santa Monica, California, were transferred to the company (R. 147-148).

Taxpayer, on November 16, 1933, in view of the depleted financial condition of the company, agreed to the suspension of the dividend payments of \$10,000 annually for three years or for such shorter period as the company was unable to make them. This agreement was made contingent on the suspension by F. A. Gillespie of his right to receive \$10,000 annually from the company, the funds thereby freed to be used in

building up the concern. It was also made contingent on the payment to taxpayer of one-half of the "net refund on Federal taxes" received by F. A. Gillespie in December 1932. It was stated that taxpayer owned a building in Los Angeles, a \$15,000 second mortgage on which she was obligated to discharge at the rate of \$2,500 annually, and that the funds to be received from F. A. Gillespie were to be applied on this obligation (R. 148).

The following payments were made under the agreement of May 15, 1929, by the company to taxpayer and F. A. Gillespie on the dates indicated (R. 148):

	<i>Petitioner</i>	<i>Gillespie</i>
1932-----	\$34,894.01	\$54,375
1933-----	25,000.00	15,000
1934-----	20,000.00	15,000
1935-----	17,666.25	-----
1936-----	19,000.00	-----
1937-----	15,000.00	-----
1938-----	15,000.00	-----
1939-----	15,000.00	-----

Of the amounts paid in 1932, \$15,394.01 received by taxpayer and \$39,375 received by F. A. Gillespie represent adjustments of amounts remaining due under the contract for the years 1929, 1930, and 1931 (R. 149).

Of the amount received by taxpayer during 1935, the taxable year, \$2,666.25 is noted on the books of the company as a loan. However, taxpayer did not sign a note nor give security for this amount. No interest was agreed on and up to the time of the hearing in this proceeding no payment of principal or interest had been made (R. 149).

An annuity upon the life of a male individual born in the United States on August 22, 1868, which would have paid \$15,000 per annum to him for his life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, for the sum of \$153,750 (R. 149).

An annuity upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$15,000 per annum to her for her life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, for the sum of \$196,537.50. An annuity upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$20,000 per annum to her for her life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, for the sum of \$262,050. An annuity upon the life of a female individual born in the United States on June 9, 1872, which would have paid the sum of \$25,000 per annum to her for her life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, for the sum of \$327,562.50 (R. 149-150).

The Commissioner asserted a deficiency on the ground that the entire amount of \$17,666.25 which the taxpayer received from the company during the taxable year should have been included in her income, presumably on the ground that the cost of the annuity was about \$700,000, and under Section 22 (b) (2) of

the applicable revenue act 3% of \$700,000 or about \$21,000 out of the annual payments of \$25,000 should be included in gross income. Since the payment for the taxable year was only \$17,666.25 all of that sum would be included in the taxpayer's income. The Board of Tax Appeals decided, however, that the cost of the annuity was what a reputable life insurance company would have charged the taxpayer at her age in 1929, when the contract was made, which was about \$327,000, and that \$9,826.88, representing 3% of the actual cost of such an annuity, should be included in gross income. The Commissioner did not file the cross appeal and therefore has acquiesced in the Board's determination that the cost of the annuity was about \$327,000, instead of \$700,000.

SUMMARY OF ARGUMENT

1. In 1929 when the taxpayer was 57 years old, she transferred property worth about \$700,000 to a corporation in consideration of its promise to pay her \$25,000 a year for the rest of her life. Inasmuch as the amount to be paid by the company depended upon the life of the taxpayer, and might be as little as several hundred dollars or as great as \$750,000, the contract could not reasonably be construed as a contract of sale but rather as a contract for an annuity. The Treasury regulations provide that amounts received under an annuity include amounts received in periodic installments, whether annually or semiannually, for life. The courts have also defined an annuity as a sum paid yearly or at other specified intervals in return for the payment of a fixed sum by the annuitant.

Since the contract in question provides that the taxpayer should receive \$25,000 a year for life, the Board correctly determined that the contract was for an annuity and not a contract of sale.

2. At the hearing before the Board of Tax Appeals the Commissioner maintained that the cost of the annuity in question was about \$700,000, which was the value of the property transferred by the taxpayer to the company. But the Board determined that the cost was what a reputable life insurance company would have charged for an annuity of \$25,000 per year for a woman of the taxpayer's age, which was about \$327,000, and that the balance of the consideration paid by the taxpayer was a gift. The Commissioner did not file a cross appeal from the Board's decision so that he is precluded from asking this Court to find that the cost was in excess of the amount determined by the Board.

However, the taxpayer's personal representative contends that the cost of an annuity of \$15,000, or about \$196,000, is the correct cost. The basis for this argument is that in 1933 the taxpayer agreed to suspend the payment of \$10,000 by the company for a period of three years. But the contract was made in 1929, and it expressly provided that the taxpayer should receive at least \$25,000 per year for her life. What she did in later years in regard to the annual payments is immaterial. The cost was fixed when the contract was executed in 1929.

3. The taxpayer's personal representative argues that Section 22 (b) (2) violates the Sixteenth Amend-

ment because until the consideration paid for an annuity is recouped, all payments under the contract are a return of capital. It is impossible to demonstrate that all payments under an annuity contract are a return of capital and Congress had a sound basis for the premise that a portion of each annuity payment in fact constitutes income. Congress fixed the rate of three percent of the cost of the annuity because it approximated the rate of return in the average annuity. In a case under the same statute involving similar circumstances, the Seventh Circuit has upheld the validity of the statute. The cases relied upon by the taxpayer's personal representative are distinguishable.

ARGUMENT

I

The agreement of May 15, 1929, between the taxpayer and her husband and the company was a contract for an annuity and not a contract of sale

The petitioner's decedent, hereafter called the taxpayer,² was born in June 1872. She and her husband had three sons and six grandchildren. In April 1940, F. A. Gillespie and Sons Company, a corporation hereafter called the company, was organized under the laws of Oklahoma with a capital stock of \$1,000,000 (R. 144).

The taxpayer and her husband in May 1929, entered into two agreements, the first of which, after reciting

² The taxpayer died in September of 1941 and her executor was substituted in her place by order of this Court, dated October 10, 1941.

that they were living apart and wished to settle their rights in their property, stated that they agreed mutually on the disposition of the property which they owned jointly. The bulk of the property was to be conveyed to the company by the terms of the second agreement which was executed by the taxpayer, her husband, and the company. The taxpayer and her husband conveyed to the company property with a value of about \$1,400,000 (R. 145).

As part consideration for the conveyance of these properties the company agreed to pay to the taxpayer and her husband each, respectively, the sum of \$15,000 per year for life and guaranteed to the taxpayer in addition that she should receive annually as dividends an amount equal at least to \$10,000. Paragraph 1 of that agreement provides in part (R. 29):

In consideration thereof, the Corporation agrees to pay to the Husband and Wife each, respectively, the sum of Fifteen Thousand (\$15,000) Dollars per year, as long as they respectively live, and in addition thereto to pay to the said wife, dividends in at least the sum of Ten Thousand (\$10,000) Dollars per year, and if for any reason funds are not available to be paid as dividends in the manner herein indicated, then in that event the Corporation agrees to pay to the said Maud Gillespie herein called the Wife, the sum of Ten Thousand Dollars (\$10,000) per year, *it being the purpose and intention of this agreement that the Corporation pay to the said Maud Gillespie in cash at least the sum of Twenty-five Thousand (\$25,000) Dollars per year hereafter.* [Italics supplied.]

In November 1933 the taxpayer, in view of the depleted financial condition of the company, agreed to the suspension of the dividend payments of \$10,000 annually for three years or for such shorter period as the company was unable to make them. The payments made to the taxpayer in the taxable year by the company aggregated \$17,666.25 (R. 148).

An annuity upon the life of a female individual born in the United States on June 9, 1872, which would have paid the amount of \$25,000 per annum to her for her life could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, for the sum of \$327,562.50 (R. 150).

Section 22 (b) (2) of the Revenue Act of 1934, Appendix, *infra*, p. 23, provides in part that amounts received as an annuity under an annuity contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to three percent of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under the 1934 income tax law or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such an annuity.

The purpose of this statutory provision is explained in the Congressional Committee Reports which are set forth in the Appendix, *infra*, p. 24. These reports show that the prior Act (the 1932 Act) did not tax annuities arising under contracts until the annuitant

had received an aggregate amount of payments equal to the total amount paid for the annuity. The reports explained that payments to annuitants are in fact based upon mortality tables which purport to reflect a rate of return sufficient to enable the annuitant to recover his cost and in addition thereto a low rate of return on his investment. The reports also said that the change in the 1934 Act continued the policy of permitting the annuitant to recoup his alleged cost tax-free but required him to include in his gross income a portion of the annual payments in an amount equal to three percent of the cost of the annuity. The reports set forth that while the percent used was arbitrary, it approximated the rate of return in the average annuity.

The reports also state that statistics show that an increasing amount of capital was going into the purchase of annuities with the result that income taxes were postponed indefinitely. The change in the statute merely placed the return on this form of investment on the same basis as other forms of investment by taxing that portion of each payment which in fact constituted income.

Article 22 (b) (2)-2 of Treasury Regulations 86, relating to the Revenue Act of 1934, Appendix, *infra*, p. 23, provides that amounts received as an annuity under an annuity or endowment contract included amounts received in periodic installments whether annually, semiannually, quarterly, monthly or otherwise, and whether for a fixed period such as a term of years or for an indefinite period such as for life.

This definition of annuities in the Regulations clearly covers the contract between the taxpayer and her husband on the one hand, and the company on the other, providing for the payment of \$25,000 per year for her life.

In *Bodine v. Commissioner*, 103 F. (2d) 982 (C. C. A. 3d), certiorari denied, 308 U. S. 576, an annuity was defined as "a sum paid yearly or at other specified intervals in return for the payment of a fixed sum by the annuitant."

In *Continental Illinois Bank & Trust Co. v. Blair*, 45 F. (2d) 345 (C. C. A. 7th), an annuity was defined as "an allowance or payment from the income of a fund at specific periods and during a prescribed term." In that case the taxpayer delivered to certain charitable institutions stocks and bonds to the amount of \$350,000 and received in return their obligations to pay him at stated times certain sums of money during a prescribed period. The Court held that these sums were purchased annuities and under the statute then in force they were exempt until the purchase price had been returned.

See also *Raymond v. Commissioner*, 114 F. (2d) 140 (C. C. A. 7th), certiorari denied, 311 U. S. 710.

Since under the contract of May 15, 1929, the company agreed to pay the taxpayer, who was 57 years old at the time, at least \$25,000 per year for the rest of her life, the contract seems to fit the definition of an annuity contract laid down in the treasury regulations and in the court decisions mentioned above. If the contract was merely a contract of sale, it is difficult

to explain the absence of a definite selling price. The annuities might have amounted to as little as a few hundred dollars, or to as great an amount as \$750,000, depending upon the life of the taxpayer. There is no evidence to show that the taxpayer reported gain or loss in the year 1929 when the contract was executed.

The taxpayer argues that the company had no authority under the law of Oklahoma to enter into a contract for an annuity (Br. 19-21). We are not concerned with the validity of the contract in this case. It is sufficient for our purposes that the company did enter into such a contract. See *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, 562.

II

The Board correctly determined the cost of the annuity

Article 22 (b) (2)-2 of Treasury Regulations 86, Appendix, *infra*, p. 23, illustrates the statute with this example: "A" bought in 1933 for \$50,000 consideration a life annuity payable in annual installments of \$5,000. For the calendar year 1934 he would be required to include in gross income \$1,500 of the \$5,000 received during that year (three percent of \$50,000), \$3,500 being exempt. If "A" should live long enough to receive as exempt \$50,000, then all amounts he receives thereafter under the annuity contract would be included in gross income.

At the hearing before the Board of Tax Appeals, the Commissioner took the position that the cost of the annuity to the taxpayer was about \$700,000, representing her share of the property transferred to the

company in consideration of the annuity. If the Commissioner had been upheld by the Board of Tax Appeals, the entire amount received by the taxpayer during the taxable year, namely, \$17,666.25, would have been included in gross income because three percent of \$700,000 (as provided by Section 22 (b) (2)) would have been in excess of \$17,666.25. But the Board of Tax Appeals decided that the cost of the annuity was \$327,562.50, representing the amount a reputable life insurance company would have charged the taxpayer at her age in May 1929, for an annuity of \$25,000 per year, and that the balance of the sum of about \$700,000 was either a gift to her children and grandchildren or a contribution to the corporate capital. Under this holding, \$9,826.88 (representing three percent of \$327,562.50) out of the \$17,666.25 received during the taxable year, was included in her gross income. The Commissioner acquiesced in this part of the Board's decision and did not file a cross appeal and so attempt to include all of the \$17,666.25 in taxpayer's gross income.

On this appeal, the petitioner contends that the Board should have determined the cost of the annuity to be about \$196,000 (the cost to the taxpayer of an annuity of \$15,000 per year), instead of about \$327,000 (the cost of an annuity of \$25,000 per year) (Br. 57-61). Of course, that would reduce the taxable income to about \$5,800 (three percent of about \$196,000) instead of about \$9,800. The petitioner contends that the taxpayer purchased two annuities, one for \$15,000 per year and another for \$10,000 per year, and that

she received nothing from the latter during the taxable year. The Board correctly construed the contract of May 15, 1929, as guaranteeing the taxpayer an annuity of \$25,000 per year because the consideration for the annuity was a lump sum and the contract expressly recited that it was the intention of the agreement that the taxpayer should receive at least \$25,000 per year in cash from the corporation. Paragraph 1 of the agreement provides in part (R. 29):

* * * In consideration thereof, the Corporation agrees to pay to the Husband and Wife each, respectively, the sum of Fifteen Thousand (\$15,000) Dollars per year as long as they respectively live, and in addition thereto to pay to the said wife, dividends in at least the sum of Ten Thousand (\$10,000) Dollars per year, and if for any reason funds are not available to be paid as dividends in the manner herein indicated, then in that event the Corporation agrees to pay to the said Maud Gillespie herein called the Wife, the sum of Ten Thousand Dollars (\$10,000) per year, *it being the purpose and intention of this agreement that the Corporation pay to the said Maud Gillespie in cash at least the sum of Twenty-five Thousand (\$25,000) Dollars per year hereafter.* [Italics supplied.]

The Board said in its opinion (R. 157-158):

The \$25,000 figure must be taken in preference to the \$15,000 sum contended for by petitioner, since the former amount was that for which the properties were transferred. Subsequent relinquishment of a portion of the an-

nunity can not alter the determination of the amount which was transferred under the 1929 contract as consideration for the annuities receivable by petitioner. No argument is made, it should be noted, that the \$10,000 guarantee of the dividends to be received annually by petitioner did not in itself constitute an annuity. Both parties seem to concede that it falls in a class with the \$15,000 annuity and we have so treated it.

III

Section 22 (b) (2) of the Revenue Act of 1934 as applied to the facts of this case does not violate the fifth or sixteenth amendments to the Constitution

The principal contention of the taxpayer's personal representative in regard to the constitutionality of Section 22 (b) (2) is that in any case where the beneficiary of an annuity contract has not received back annuity payments equalling the consideration paid for the contract, the requirement that a portion of the annuity payments (i. e., so much as is not in excess of three percent of the consideration paid for the contract) must be included in gross income, imposes a direct tax upon capital rather than a tax upon income.

The argument is based on the fallacious premise that until the consideration paid for an annuity contract is recouped, all payments under the contract are a return of capital. This is plainly not the case, as pointed out in the House and Senate Committee Reports on the 1934 Act (*infra*, pp. 24-26), "Payments to annuitants are, in fact, based upon mortality tables

which purport to reflect a rate of return sufficient to enable the annuitant to recover his cost and in addition thereto a low rate of return on his investment." Section 22 (b) (2) is designed to tax that portion of each annuity payment which does in fact constitute income. However, because it would be almost impossible to determine the precise amount of income which is included within any particular annuity payment, Congress fixed three percent of the cost of the annuity as the amount to be treated as income; it recognized that "While the percent used is arbitrary, it approximates the rate of return on the average annuity" (*infra*, p. 25).

None of the authorities cited by the taxpayer's personal representative (Br. 38-49) throws any doubt upon the validity of Congressional action in this respect. In *Burnet v. Logan*, 283 U. S. 404, upon which the taxpayer's personal representative chiefly relies, the taxpayer had sold shares of stock in a company engaged in mining ore for cash and a royalty for each ton of ore thereafter mined. The Supreme Court held that the taxpayer was not subject to income tax upon any of the royalties until they exceeded her cost basis. The case is clearly distinguishable, because the *Logan* case involved no statute corresponding to Section 22 (b) (2). The only court which has passed upon the constitutionality of Section 22 (b) (2) of the Revenue Act of 1934, is the Circuit Court of Appeals for the Seventh Circuit. In *Raymond v. Commissioner*, *supra*, the taxpayer transferred to certain charitable and educational institutions securities valued at about

\$1,200,000 in return for payment to her of \$62,500 each year of her life. An annuity for a corresponding amount would have cost the taxpayer about \$528,000. The taxpayer contended that Section 22 (b) (2) of the Revenue Act of 1934 was unconstitutional as applied to the facts of that case because she had not yet recouped, through annuity payments, the entire consideration she paid for the annuities. The court held that the statute was valid as applied to the facts of that case.

A close analogy to the present case is to be found in Section 44 (a) of the Revenue Act of 1934, which provides that any person who regularly sells personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year, which the gross profit realized or to be realized when payment is completed, bears to the total contract price. The vendor in the case of an installment sale, like the annuitant here, does not immediately recoup his capital and there is a possibility he may never recoup it. Yet the validity of the provision for treating a portion of each installment payment as income has never been questioned. Cf. *Pacific National Co. v. Welch*, 304 U. S. 191; *Nuckolls v. United States*, 76 F. (2d) 357 (C. C. A. 10th); *Lawler v. Commissioner*, 78 F. (2d) 567, decided by this Court.

The taxpayer's personal representative argues that of the sum of \$17,666.25 received by the taxpayer from the company in the taxable year, \$2,666.25 represented a loan. (Br. 50-56.) We believe this question is im-

material under the circumstances of this case, because the Board of Tax Appeals has decided that only \$9,826.88 (three percent of \$327,562.50) out of the total payment of \$17,666.25, received by the taxpayer from the company, should be included in gross income. For the purposes of this tax year, it does not make any difference whether the sum was a loan or not. If the question becomes important in any tax year between 1936 and 1941, when the taxpayer died, the question may be considered at that time.

CONCLUSION

The decision of the Board of Tax Appeals is correct and should therefore be affirmed.

Respectfully submitted,

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

J. LOUIS MONARCH,

MORTON K. ROTHSCHILD,

Special Assistants to the Attorney General.

DECEMBER 1941.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

* * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * *

(2) *Annuities, etc.*—* * * Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this title or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. * * *

(U. S. C., Title 26, Sec. 22.)

Treasury Regulations 86, relating to the Revenue Act of 1934:

ART. 22 (b) (2)—2. *Annuities.*—Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for

life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year.

* * * As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income. The provisions of this article may be illustrated by the following examples:

Example (1): A bought in 1933, for \$50,000 consideration, a life annuity, payable in annual installments of \$5,000. For the calendar year 1934 he would be required to include in gross income \$1,500 of the \$5,000 received during that year (3 percent of \$50,000), \$3,500 being exempt. If A should live long enough to receive as exempt \$50,000, then all amounts he receives thereafter under the annuity contract would be included in gross income.

* * * * *

Congressional Committee Reports, relating to Section 22 (b) (2) of the Revenue Act of 1934:

H. Rep. No. 704, 73d Cong., 2d Sess., p. 21 (1939-1 Cum. Bull. (Part 2) 554, 569):

SECTION 22 (b) (2). *Annuities, etc.*—The present law does not tax annuities arising under contracts until the annuitant has received an aggregate amount of payments equal to the total amount paid for the annuity. Payments to annuitants are, in fact, based upon mortality tables which purport to reflect a rate of return sufficient to enable the annuitant to recover his cost and in addition thereto a low rate of return on his investment. The change continues the policy of permitting the annuitant to recoup his original cost tax-free but requires him to include in his gross income a portion of the annual payments in an amount equal to 3 percent

of the cost of the annuity. While the percent used is arbitrary, it approximates the rate of return in the average annuity.

Statistics show that an increasing amount of capital is going into the purchase of annuities, with the result that income taxes are postponed indefinitely. The change merely places the return of this form of investment on the same basis as other forms of investment by taxing that portion of each payment which in fact constitutes income.

S. Rep. No. 558, 73d Cong., 2d Sess., p. 23 (1939-1 Cum. Cum. Bull. (Part 2) 586, 604) :

Section 22 (b) (2) Annuities

The present law does not tax annuities arising under contracts until the annuitant has received an aggregate amount of payments equal to the total amount paid for the annuity. Payments to annuitants are, in fact, based upon mortality tables which purport to reflect a rate of return sufficient to enable the annuitant to recover his cost, and in addition thereto, a low rate of return on his investment.

The House bill continues the policy of permitting the annuitant to recoup his original cost tax-free, but requires him to include in his gross income a portion of the annual payments in an amount equal to 3 percent of the cost of the annuity. While your committee is in agreement with the change made by the House, it was thought advisable to continue the policy of not taxing any portion of the amount received from an annuity until the aggregate amount of payments equal the total amount paid for the annuity in cases where the aggregate amount received by the annuitant from all his annuities is not more than \$500. The following example illustrates the change made:

Example: "A", an individual, received during the calendar year the following amounts from annuities: annuity no. 1, \$450; annuity no. 2, \$300; and annuity no. 3, \$150. In the case of annuity no 1, "A" prior to 1934 received aggregate payments equal to the aggregate premiums paid. In the case of annuity no. 1, "A" reports the entire amount of the annuity because all of his capital has been returned. In the case of annuity no. 2 and annuity no. 3, "A" is required to include in gross income 3 percent of the consideration paid for each such annuity. The \$500 exemption will not apply in such a case because the total annuity payments received by "A" during the taxable year exceed that amount.

H. Conference Rep. No. 1385, 73d Cong., 2d Sess., p. 17 (1939-1 Cum. Bull. (Part 2) 627, 628):

Amendment No. 14.—The House bill requires an annuitant to include in his gross income a portion of the annual receipts in an amount equal to 3 percent of the cost of the annuity. The Senate amendment excepts from the House change persons whose aggregate receipts from annuities in the year do not exceed \$500, and makes some minor changes in phraseology. The House recedes with an amendment rejecting the \$500 exception.

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

VS.

JACK L. WARNER,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the
United States Board of Tax Appeals

FILED

NOV 18 1941

PAUL P. O'BRIEN,
CLERK

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

STANLEIGH P. FRIEDMAN,
LAWRENCE A. BAKER.

For Comm'r.:

B. M. BRODSKY, Esq.

Docket No. 97401.

JACK L. WARNER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1939

Mar. 8—Petition received and filed. Taxpayer notified. (Fee paid.)

Mar. 8—Copy of petition served on General Counsel.

Mar. 8—Request for Circuit hearing in Washington, D.C., filed by taxpayer. March 8, 1939, copy served.

Apr. 19—Answer filed by General Counsel.

Apr. 19—Request for Circuit hearing in Los Angeles, California, filed by General Counsel.

Apr. 24—Hearing set May 17, 1939, on respondent's request. Copy of answer served.

May 5—Motion to transfer to the New York calendar filed by taxpayer. May 8, 1939, granted.

1940

Feb. 23—Motion for leave to file amendment to petition, amendment to petition lodged filed by taxpayer.

Feb. 24—Motion for leave to file amendment to petition granted.

Feb. 27—Hearing set April 1, 1940, New York City.

Feb. 26—Copy of motion and amendment to petition served on General Counsel.

Apr. 4—Hearing had before Mr. Murdock on merits. Submitted. Respondent moves to file amended answer. Granted. Reply to amended answer filed by petitioner. Appearance of Lawrence A. Baker, Esq., filed. Amended answer filed. Copy served. Amended reply filed. Copy served. Stipulation of facts filed. Petitioner's brief due May 4, 1940. Respondent's brief June 4, 1940. Replies July 5, 1940.

Apr. 15—Amendment to petition filed by taxpayer. April 15, 1940, copy served on General Counsel.

Apr. 15—Transcript of hearing April 4, 1940, filed.

Apr. 23—Answer to amendment to petition filed by General Counsel. April 24, 1940, copy served. [1*]

*Page numbering appearing at top of page of original certified Transcript of Record.

1940

Apr. 30—Reply to answer to amendment to petition filed by taxpayer.

Apr. 30—Copy of reply served on General Counsel.

May 11—Motion for leave to file the attached printed brief filed by taxpayer. May 13, 1940, granted.

May 13—Brief filed by taxpayer.

May 13—Copy of motion and brief served on General Counsel.

May 31—Motion for extension to June 15, 1940, to file brief filed by General Counsel.

July 30—Motion for leave to file the attached brief. Brief lodged, filed by General Counsel. August 3, 1940, granted.

Sept. 11—Motion for leave to file the attached reply brief (printed) filed by taxpayer. September 16, 1940, denied. Brief returned.

Oct. 15—Opinion rendered. Murdock. Decision will be entered under Rule 50.

Dec. 6—Agreed computation of deficiency filed.

Dec. 13—Decision entered. Murdock, Division 3.

1941

Mar. 6—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

Mar. 19—Proof of service filed by General Counsel (2).

Apr. 16—Certified copy of an order from 9th Circuit extending time to June 16, 1941, to prepare and transmit the record filed.

1941

- June 11—Certified copy of an order from the 9th Circuit extending time to August 15, 1941, to prepare and transmit the record filed.
- Aug. 11—Certified copy of an order from 9th Circuit extending time to September 15, 1941, to complete the record filed.
- Sept. 3—Statement of points filed by General Counsel. Proof of service thereon.
- Sept. 3—Designation of portions of the record filed by General Counsel. Agreed to, proof of service thereon. [2]

United States Board of Tax Appeals

Docket No. 97401

JACK L. WARNER,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above named petitioner hereby petitions for a redetermination of the alleged deficiency in Federal gift tax set forth by the Commissioner of Internal Revenue in his notice of deficiency in gift tax liability for the calendar and taxable years 1932, 1933, 1934 and 1935, which notice bears date December 21, 1938, and symbols MT-ET-GT-474-32-33-34-35-6th California, and as a basis of his proceeding, alleges as follows:

1: The petitioner is a citizen of the United States of America residing at 1801 Angelo Drive, Beverly Hills, California.

2: The notice of deficiency (with Bureau letter of August 4, 1938 annexed), a copy of which is attached and marked Exhibit "A", purports to have been mailed to [3] petitioner on December 21, 1938.

3: The taxes in controversy are Federal gift taxes for the calendar years 1932, 1933, 1934 and 1935.

4: The determination of the alleged deficiencies set forth in said notice of deficiency is based upon the following errors:

(a) The respondent erred in his conclusion set forth in the Bureau letter of August 4, 1938, attached to the Notice of Deficiency, captioned Schedule B, which is as follows:

Schedule B

An examination of the trust agreement created on May 26, 1932, wherein Albert Warner is named as grantor, discloses that under Article 5 Harry M. Warner, Jack L. Warner and Stanleigh P. Friedman, and the survivors and survivor of them shall have the right and power at any time to alter, amend or revoke the trust instrument. In case the trust is revoked in whole or in part to the extent as to which the trust is revoked shall be transferred to you, or to your estate if deceased. Since you, and not Albert Warner, appear to be the actual settlor

of this trust, and, accordingly, as Harry M. Warner and Stanleigh P. Friedman are persons not having a substantial adverse interest in the disposition of the trust property or income therefrom, it is the opinion of this office that the trust is revocable insofar as you are concerned, and the income paid to the beneficiaries under the trust, other than yourself, represents gifts by you of the actual amount received by the beneficiaries each year. [4]

(b) The respondent erred in the following computations based upon the false conclusion set forth in Schedule B, as follows:

(i) Tentative determination with respect to calendar year 1932, to increase "Total Gifts" "Net Gifts", "Tax on Net Gifts" and "Deficiency" as set forth in Statement accompanying Commissioner's letter of August, 1938.

(ii) Tentative determination with respect to calendar year 1933 to increase "Total Gifts", "Gross Gifts", "Net Gifts", "Net Gifts for Preceding Years", "Tax on Total Net Gifts", "Tax on Net Gifts for Preceding Years", "Tax on Net Gifts for 1933" and "Deficiency for 1933" as set forth in Statement accompanying said letter of August 4, 1938.

(iii) With respect to calendar year 1934—"Corrected Computation" of "Total Gifts 1934", "Net Gifts for Preceding Years", "Total Net Gifts", "Specific Exemption", "Net

Gifts'' as set forth in Statement accompanying said letter of August 4, 1938.

(iiii) Tentative determination with respect to calendar year 1935, to increase "Total Gifts", "Net Gifts", "Net Gifts for Preceding Years", "Total Net Gifts", "Tax on Total Net Gifts", "Tax on Net Gifts for Preceding Years", "Tax on Net Gifts 1935'', and Alleged Deficiency arrived at for 1935, as set forth in the Statement accompanying said letter of August 4, 1938.

(c) The respondent erred in his determination to assess additional gift tax for gifts made during the calendar year 1934 and in using a "Corrected Computation" of total gifts for the year 1934 in arriving at "amount of Net Gifts for preceding years" for the purpose of determining alleged deficiency in gift tax for gifts made [5] during the calendar year 1935.

5: The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) That Albert Warner, and not the petitioner, is the actual settlor and grantor of the Trust under review. This Trust was created by an Indenture of Trust executed and delivered, together with the securities constituting the corpus thereof, upon and under date of May 26, 1932, by Albert Warner, grantor, to Central Hanover Bank and Trust Company and Harry M. Warner, Jack L. Warner, Albert Warner and Stanleigh P. Friedman, Trustees.

(b) That the securities constituting the corpus of said Trust were at all times prior to the delivery thereof, as aforesaid, the property of Albert Warner.

(c) That Harry M. Warner and Stanleigh P. Friedman are persons having a substantial adverse interest in the disposition of the trust property and the income therefrom contrary to the statement in Schedule B. [6]

(d) That said Trust is irrevocable and that the income paid thereunder to the beneficiaries does not represent gifts by Jack L. Warner, contrary to the statement of "opinion" of the Gift Tax Bureau set forth in said Schedule B.

(e) That the statutory period within which an assessment may be made for gifts made during the calendar year of 1934 has expired; that heretofore and pursuant to a notice of deficiency dated August 13, 1937, the said petitioner was assessed a deficiency of \$521.38 for gift tax upon gifts made by the petitioner during the calendar year 1934, which deficiency has heretofore been paid in full by petitioner; that by reason whereof respondent is barred by law from increasing the amount of net gifts made during calendar year 1934 in order to arrive at "amount of Net Gifts for Preceding Years" in order to compute the gift tax upon net gifts made during the calendar year 1935.

6. The petitioner prays for relief from the deficiency asserted by the respondent in the following and each of the following particulars: [7]

(a) With respect to each and every assignment of error, an order be entered directing respondent to revise or modify the action proposed by the deficiency letter.

(b) For such other and further relief as to the Board may seem just and proper.

Wherefore, petitioner prays that this Board may hear this appeal and redetermine the deficiency herein alleged.

STANLEIGH P. FRIEDMAN

Attorney for Petitioner, 11
West 42nd Street, New York
City, New York. [8]

State of New York,
County of New York.—ss.

Jack L. Warner, being duly sworn, says: that he is the petitioner above-named; that he has read the said petition or had the same read to him; that he is familiar with the statements therein contained and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

JACK L. WARNER

Subscribed and sworn to before me this 2 day of
March, 1939.

(Seal) ELAINE C. SILVERMAN
Notary Public, Kings Co. Clks. No. 897, Reg. No.
9205 N. Y. Co. Clks. No. 373, Reg. No. 9S373
Commission expires March 30, 1939. [9]

EXHIBIT "A"

Treasury Department
Washington

Office of
Commissioner of Internal
Revenue
Address Reply to
Commissioner of Internal Revenue
And Refer to
MT-ET-GT-474-32-33-34-35-6th California
Donor—Jack L. Warner
Dec. 21, 1938

Mr. Jack L. Warner,
1801 Angelo Drive,
Los Angeles, California.

Sir:

You are advised that the determination of your
gift tax liability for the calendar years 1932, 1933,
1934 and 1935 discloses a deficiency of \$4,586.15
(\$75.14 for 1932, \$541.60 for 1933 and \$3,969.41 for
1935) as shown in the statement attached.

In accordance with the provisions of existing
internal revenue laws, notice is hereby given of the
deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the inclosed forms and forward them to this office. The signing and filing of these forms will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the forms, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner

By D. S. BLISS

Deputy Commissioner

Inclosures:

Statement.

Waivers.

Copy of letter. [10]

MT-ET-474-32-33-34-35-6th California

Donor—Jack L. Warner

STATEMENT

Your protest, which was made the subject of a conference in the office of the Internal Revenue Agent in Charge, Upper New York Division, is

directed against the inclusion in gross gifts of the income during the years 1932, 1933, 1934 and 1935 from the revocable trust created on May 26, 1932, of which you were the actual settler.

You are advised that while careful consideration has been given to all of the statements made in your protest, the evidence submitted is insufficient to warrant any changes in the gifts tentatively determined in this case. Accordingly, the Bureau adheres to the deficiency of \$4,586.15 (\$75.14 for 1932, \$541.60 for 1933 and \$3,969.41 for 1935) as set out in Bureau letter of August 4, 1938, a copy of which is inclosed.

The following computations show your Federal gift tax liabilities for the calendar years 1932, 1933 and 1935, which are hereby made final:

1932		
	Returned	Determined
Total gifts, 1932.....	\$ 6,714.18	\$26,723.22
Less exclusions	0.00	10,000.00
Gross gifts	6,714.18	16,723.22
Less specific exemption.....	6,714.18	6,714.18
Net gifts, 1932.....	0.00	10,009.04
Tax on net gifts, 1932.....		75.14
Tax assessed on return.....		0.00
Deficiency.....		\$ 75.14

	Returned	Determined
1933		
Total gifts, 1933.....	\$21,591.90	\$57,140.88
Less exclusions	0.00	10,000.00
Gross gifts	21,591.90	47,140.88
Less specific exemption.....	21,591.90	21,591.90
Net gifts, 1933.....	0.00	25,548.98
Net gifts for preceding years.....	0.00	10,009.04
Total net gifts.....	0.00	35,558.02
		[11]
Tax on total net gifts.....		\$ 616.74
Tax on net gifts for preceding years..		75.14
Tax on net gifts, 1933.....		541.60
Tax assessed on return.....		0.00
Deficiency		\$ 541.60
1935		
Total gifts, 1935.....	\$22,014.78	\$57,274.56
Less exclusions	5,000.00	10,000.00
Amount included	17,014.78	47,274.56
Less specific exemption.....	0.00	0.00
Net gifts, 1935.....	17,014.78	47,274.56
Net gifts for preceding years.....	5,665.23	100,714.77
Total net gifts.....	22,680.01	147,989.33
Tax on total net gifts.....	285.30	8,519.04
Tax on net gifts for preceding years..	0.00	4,264.33
Tax on net gifts, 1935.....	285.30	4,254.71
Tax assessed on return.....		285.30
Deficiency		\$ 3,969.41

Treasury Department

Washington

Office of

Commissioner of Internal

Revenue

Address reply to

Commissioner of Internal Revenue

And Refer to

MT-ET-GT-474-32-33-34-35-6th California

Aug. 4, 1938

Donor—Jack L. Warner

Mr. Jack L. Warner,

1871 Angelo Drive,

Los Angeles, California.

Sir:

The examination by this office of your gift tax returns for the years 1932, 1933 and 1935 indicates that the adjustment of your tax liability shown in the accompanying statement is warranted.

If you agree to the adjustment shown in the accompanying statement, the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the additional tax and to stop the accumulation of interest. Such interest will cease thirty days after the receipt of the executed form, or upon the payment of the additional tax to the collector, whichever occurs first.

If you desire to make immediate payment of the additional tax without awaiting assessment, you

should forward your remittance to the Collector of Internal Revenue at Los Angeles, California, enclosing this letter, or a copy thereof. Interest on the additional tax should be included in your remittance, computed at the rate of six percent per annum from the due date of the tax to the date of payment.

If you do not agree to the proposed adjustment, you may file a protest, executed in triplicate under oath, with the Internal Revenue Agent in Charge, Los Angeles, California, within thirty days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in the office of the Internal Revenue Agent in Charge will be granted you prior to final determination of any deficiency against you. This letter is not a final notice of deficiency, and this office will be pleased to answer any questions which may occur to you in your examination of the enclosed statement.

Should you fail to pay the additional tax to the collector of internal revenue or to file with this office within the thirty-day period mentioned either a waiver on the enclosed form or to file with [13] the Internal Revenue Agent in Charge a written protest, final determination of your tax liability will be made and a notice of deficiency will be sent to you in accordance with the provisions of law applicable to the assessment and collection of gift tax deficiencies.

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,

D. S. BLISS,

Deputy Commissioner.

Enclosures:

Statement.

Form of waiver.

Form of acknowledgment. [14]

MT-ET-GT-474-32-33-34-35-6th California

Donor—Jack L. Warner

STATEMENT

1932

	Returned	Tentatively Determined
Total gifts, 1932.....	\$ 6,714.18	\$26,723.22
Less exclusions	0.00	10,000.00
Gross gifts	6,714.18	16,723.22
Less specific exemption.....	6,714.18	6,714.18
Net gifts, 1932.....	0.00	10,009.04
Tax on net gifts, 1932.....		75.14
Tax assessed on return.....		0.00
Deficiency		\$ 75.14

The deficiency results from the following adjustments:

SCHEDULE B

An examination of the trust agreement created on May 26, 1932, wherein Albert Warner is named as grantor, discloses that under Article 5 Harry M. Warner, Jack L. Warner and Stanleigh P. Friedman, and the survivors and survivor of them shall have the right and power at any time to alter, amend or revoke the trust instrument. In case the trust is revoked in whole or in part to the extent as to which the trust is revoked shall be transferred to you, or to your estate if deceased. Since you, and not Albert Warner, appear to be the actual settlor of this trust, and, accordingly, as Harry M. Warner and Stanleigh P. Friedman are persons not having a substantial adverse interest in the disposition of the trust property or income therefrom, it is the opinion of this office that the trust is revocable insofar as you are concerned, and the income paid to the beneficiaries under the trust, other than yourself, represents gifts by you of the actual amount received by the beneficiaries each year.

Income during 1932 from June 6 to December 31, 1932 paid to Irma Warner

0.00 10,004.52

[15]

Returned

Tentatively
Determined

Income during 1932 from June 6 to December 31, 1932 paid to Jack M. Warner

0.00 10,004.52

Tentatively
Determined

Returned

Exclusions 10,000.00

0.00

To balance (amount of increase).....\$10,009.04

1933

	Returned	Tentatively Determined
Total gifts, 1933.....	\$21,591.90	\$57,140.88
Less exclusions	0.00	10,000.00
Gross gifts	21,591.90	47,140.88
Less specific exemption.....	21,591.90	21,591.90
Net gifts, 1933.....	0.00	25,548.98
Net gifts for preceding years.....	0.00	10,009.04
Total net gifts.....	0.00	35,558.02
Tax on total net gifts.....		616.74
Tax on net gifts for preceding years		75.14
Tax on net gifts, 1933.....		541.60
Tax assessed on return.....		0.00
Deficiency		541.60

The deficiency is due to the increase in net gifts for preceding years as shown above, and to the following adjustments for the calendar year 1933:

SCHEDULE B

Income during 1933 paid to Irma Warner under trust dated May 26, 1932	0.00	17,774.49
Income during 1933 paid to Jack M. Warner under trust dated May 26, 1932	0.00	17,774.49

[16]

	Tentatively Determined	Returned
Exclusions	\$10,000.00	\$ 0.00
To balance (amount of increase).....	25,548.98	

1934

For the purpose of arriving at the total gifts for the subsequent years, the following computation shows the correct net gifts for 1934:

	Returned	Corrected Computation
Total gifts, 1934.....	\$82,482.00	\$126,850.67
Less exclusions	40,000.00	40,000.00
Amount included	42,482.00	86,850.67
Less specific exemption.....	42,482.00	21,693.92
Net gifts, 1934.....	0.00	65,156.75
Net gifts for preceding years.....		35,558.02
Total net gifts.....		100,714.77

In view of the fact that the statutory period within which an assessment may be made for this calendar year has expired, no additional tax is proposed on the basis of the net gifts as above corrected.

The correct net gifts for 1934 are determined as follows:

Determined in Bureau letter of August 13, 1937	32,379.41
Income during 1934 paid to Irma Warner under trust dated May 26, 1932 (not reported)	21,581.76
Income during 1934 paid to Jack M. Warner under trust dated May 26, 1932 (not reported).....	21,195.58
Total gifts not reported or considered in Bureau letter of August 13, 1937	42,777.34
Less exclusions for above gifts.....	10,000.00
Amount increased over Bureau letter of August 13, 1937.....	32,777.34
Correct net gifts for 1934.....	\$65,156.75

1935

	Returned	Tentatively Determined
Total gifts, 1935.....	\$22,014.78	\$57,274.56
Less exclusions	5,000.00	10,000.00
Amount included	17,014.78	47,274.56
Less specific exemption.....	0.00	0.00
Net gifts, 1935.....	17,014.78	47,274.56
Net gifts for preceding years.....	5,665.23	100,714.77
Total net gifts.....	22,680.01	147,989.33
Tax on total net gifts.....	285.30	8,519.04
Tax on net gifts for preceding years..	0.00*	4,264.33
Tax on net gifts, 1935.....	285.30	4,254.71
Tax assessed on return.....		285.30
Deficiency.....		3,969.41

*None computed—should be \$42.49.

The deficiency is due to the increase in net gifts for preceding years as shown above, and to the following adjustments for the calendar year 1935:

SCHEDULE A

Income during 1935 from trust dated May 26, 1932 by Albert Warner as grantor paid to Irma Warner.....	0.00	16,678.18
Income during 1935 from trust dated May 26, 1932 by Albert Warner as grantor paid to Jack M. Warner.....	0.00	18,581.60
	Tentatively Determined	Returned
Exclusions	10,000.00	5,000.00
To balance (amount of increase).....	\$30,259.78	

[Endorsed]: U. S. B. T. A. Filed March 8, 1939.

[18]

[Title of Board and Cause.]

ANSWER

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition.

4. (a), (b) and (c). Denies the allegations of error contained in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5. (a) to (e), inclusive. Denies the allegations contained in subparagraphs (a) to (e), inclusive, of paragraph 5 of the petition. [19]

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the petition be de-

nied and that the respondent's determination be in all respects approved.

(Signed) J. P. WENCHEL

FTH

Chief Counsel

Bureau of Internal Revenue

Of Counsel:

ALVA C. BAIRD

FRANK T. HORNER

Special Attorneys,

Bureau of Internal Revenue

FTH/W 4/14/39

[Endorsed]: U. S. B. T. A. Filed Apr. 19, 1939.

[20]

[Title of Board and Cause.]

AMENDED ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for amended answer to the petition filed in the above-entitled proceeding admits, denies, avers and alleges as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition.

4.(a), (b), and (c). Denies that the Commissioner erred as alleged in subparagraphs (a), (b), and (c) of paragraph 4 of the petition.

5.(a) to (e), inclusive. Denies the allegations contained in subparagraphs (a) to (c), inclusive, of paragraph 5 of the petition.

6. As alternative to the determination by the Commissioner of Internal Revenue that the amounts of income received by the trust and paid to the beneficiaries during each of the years in question under the trust indenture executed by Albert Warner on May 26, 1932, are taxable in each of said years to the petitioner as gifts by him of said amounts to the said beneficiaries in each of the said years, avers that the amounts of income received by the trust and paid to the beneficiaries during each of the years in question under the trust indenture executed by the petitioner, Jack L. Warner, on May 26, 1932, are taxable in each [21] of said years to the petitioner as gifts by him of said amounts to the said beneficiaries in each of the said years.

7. In support of the foregoing alternative averment contained in paragraph 6 hereof, avers and alleges as follows:

(a). On May 26, 1932, the petitioner, Jack L. Warner, executed a trust indenture, and thereafter delivered it, together with the securities constituting the corpus thereof, to Central Hanover Bank and Trust Company, Harry M. Warner, Albert Warner, Jack L. Warner, and Stanleigh P. Friedman, as trustees.

(b). The income received by the trust and paid to the several beneficiaries under the aforesaid trust during each of the following years was as follows:

	Rea Warner	Doris Warner (Leroy)	Betty Warner
1932: (October 17)	\$20,009.03	\$10,004.53	\$10,004.53
1933: (April 17)	18,729.89	9,364.94	9,364.83
(October 17)	16,872.24	8,409.56	8,409.67
	<hr/>	<hr/>	<hr/>
	35,602.13	17,774.50	17,774.50
1934: (April 17)	21,486.20	10,821.13	10,821.03
(October 16)	20,980.51	10,605.37	10,605.42
	<hr/>	<hr/>	<hr/>
	42,466.71	21,426.50	21,426.45
1935: (April 16)	18,185.17	9,290.85	9,174.28
(October 16)	17,427.76	8,844.30	8,850.30
	<hr/>	<hr/>	<hr/>
	\$35,612.93	\$18,135.15	\$18,024.58

(c). Under the terms of the aforesaid trust indenture, the receipt of income thereunder by the aforesaid beneficiaries was dependent in each of the aforesaid years upon the non-exercise of a power to alter, amend or revoke the said trust and the interests created thereunder.

(d). A completed gift of the income of the aforesaid trust was made in each year upon the receipt of said income by the trust and payment [22] of the said income to the aforesaid beneficiaries.

(e). The aforesaid amounts of income received by the trust and paid to the beneficiaries under the said trust indenture in each of the said years constituted gifts by the petitioner of those amounts to the beneficiaries in each of the said years.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the determination of the Commissioner be approved, or, in the alternative, that the petitioner's appeal be denied and that the Board redetermine the deficiencies in the amounts determined by the Commissioner plus such additional amounts as may result from the alternative position stated in this amended answer, to which additional amounts claim is hereby made.

J. P. WENCHEL

ECA

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

E. O. HANSON,

Division Counsel.

BENJAMIN M. BRODSKY,

Special Attorney,

Bureau of Internal Revenue.

[Endorsed]: U. S. B. T. A. Filed at hearing
Apr. 4, 1940. [23]

[Title of Board and Cause.]

REPLY TO AMENDED ANSWER

Comes now the Petitioner by his attorney, Stanleigh P. Friedman, and for reply to the amended answer filed by the Respondent in the above entitled proceeding, admits and denies as follows:

6: Denies the allegations contained in paragraph "6" of the amended answer.

7:(a) Admits the allegations of fact contained in paragraph 7(a) of the amended answer.

(b) Admits the allegations of fact contained in paragraph 7(b) of the amended answer.

(c) Denies the allegations contained in paragraph 7(c) of the amended answer. [24]

(d) Denies the allegations contained in paragraph 7(d) of the amended answer.

(e) Denies the allegations contained in paragraph 7(e) of the amended answer.

STANLEIGH P. FRIEDMAN

[Endorsed]: U. S. B. T. A. Filed at hearing Apr. 4, 1940. [25]

[Title of Board and Cause.]

AMENDMENT TO PETITION

Pursuant to leave first had and obtained, petitioner files this amendment to his petition in this cause.

4-(d) Respondent has erred in his computation of the amount of the net gifts made by petitioner in each of the years 1932, 1933, 1934 and 1935, which results from his failure to correctly determine the number of statutory exclusions and the amount of the exemption allowable for each of the several years.

5-(f) Petitioner is advised and believes and therefore avers that regardless of any redetermina-

tion by the Board on the issues raised in this proceeding, petitioner is entitled to exclusions as follows:

For the year 1932.....\$6,714.18

(representing premiums paid during the calendar year by the petitioner for policies of life insurance [26] upon his life duly transferred to and held by the trustees under Life Insurance Trust of which there were two beneficiaries)

For the year 1933.....\$10,000.

For the year 1934..... 10,000.

For the year 1935..... 10,000.

(representing part of the amount of premiums paid by petitioner in each of the foregoing years for policies of life insurance upon his life duly transferred to and held by the trustees under Life Insurance Trust of which there were two beneficiaries)

5-(g) In the alternative, petitioner is advised and believes and therefore avers that if the respondent prevails in the contentions set forth in the paragraphs "6" and "7" of his amended answer filed herein, petitioner is entitled to the following exclusions in addition to those claimed in paragraph 5-(f) hereof, to wit:

For each of the years 1933, 1934 and 1935 petitioner is entitled to three exclusions aggregating

gating \$15,000. due to the fact that such a re-determination would recognize three additional donees of alleged gifts by petitioner.

STANLEIGH P. FRIEDMAN

Attorney for Petitioner [27]

State of California,

County of Los Angeles—ss.

Jack L. Warner being duly sworn, says that he is the petitioner above named; that he has read the amendment to petition or had the same read to him; that he is familiar with the statements therein contained and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

JACK L. WARNER

Subscribed and sworn to before me this 12th day of April, 1940.

C. H. WILDER

Notary Public.

[Endorsed]: U. S. B. T. A. Filed April 15, 1940.

[28]

[Title of Board and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to petition filed in the above-entitled

proceeding admits, denies, avers and alleges as follows:

4-(d). Denies that the Commissioner erred as alleged in subparagraph (d) of paragraph 4 of the amendment to petition.

5-(f) and (g). Denies the allegations contained in subparagraphs (f) and (g) of paragraph 5 of the amendment to petition.

8. Avers that the Commissioner has erred in allowing two exclusions aggregating \$10,000 for each of the years 1932, 1933, 1934 and 1935 with respect to the trust indenture dated May 26, 1932, in which Albert Warner is named as grantor and Jack L. Warner, Irma Warner and Jack M. Warner are named as beneficiaries.

9. In support of the foregoing averment contained in paragraph 8 hereof, avers and alleges as follows:

(a) In the notice of deficiency issued by the Commissioner two exclusions, aggregating \$10,000, were allowed with [29] respect to the aforesaid trust indenture. Under the facts and circumstances with reference to the aforesaid trust referred to in paragraph 8 hereof, only one exclusion of \$5,000 is allowable.

Denies generally and specifically each and every allegation contained in the amendment to petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Board redetermine the

deficiencies in the amounts determined by the Commissioner, plus such additional amounts as may result from the alternative position stated in the amended answer heretofore filed in this proceeding, and the affirmative position stated in this answer to the amendment to petition, to which additional amounts claim is hereby made

J. P. WENCHEL

ECH

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

E. O. HANSON,

Division Counsel,

BENJAMIN M. BRODSKY,

Special Attorney,

Bureau of Internal Revenue.

BMB:GEM 4/20/40

[Endorsed]: U. S. B. T. A. Filed Apr. 23, 1940.

[30]

[Title of Board and Cause.]

REPLY TO ANSWER
TO AMENDMENT TO PETITION.

Comes now the petitioner by his attorneys Stanleigh P. Friedman and Lawrence A. Baker and for reply to the answer to amendment to petition filed by the respondent in the above-entitled proceeding admits and denies as follows:

8. Denies the allegations contained in paragraph 8 of the answer to amendment to petition.

9. Admits the allegation in paragraph 9-(a) that in the notice of deficiency issued by the respondent two exclusions aggregating \$10,000 were allowed but denies each and every other allegation of said paragraph.

Denies generally and specifically each and every allegation contained in the answer to amendment to petition not hereinbefore specifically admitted, qualified or denied.

STANLEIGH P. FRIEDMAN,
LAWRENCE A. BAKER,
Attorneys for Petitioner.

[Endorsed]: U.S.B.T.A. Filed Apr. 30, 1940. [31]

[Title of Board and Cause.]

STIPULATION OF FACTS.

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above-named taxpayer, by their respective undersigned attorneys, that the following facts are conceded to be true with like force and effect as though the facts herein conceded to be true were established by competent evidence, subject to the right of either party to contend that any fact herein stipulated is not relevant or material to the questions at issue.

1. On or about May 26, 1932, Albert Warner, a brother of the petitioner herein, executed an Inden-

ture of Trust bearing said date. A true copy of said Indenture as executed by the parties thereto is attached hereto as Exhibit "A" and hereby made a part hereof. On or before June 4, 1932, Albert Warner delivered said Indenture to the trustees named therein, including Central [32] Hanover Bank and Trust Company, a banking corporation in New York City, hereinafter referred to as Central Hanover, and delivered to Central Hanover on behalf of all the trustees named therein, certain securities (United States Government obligations) therein named and described of the aggregate face amount of \$2,000,000.

The securities referred to in said Indenture are described by number and amount in a receipt executed and delivered by Central Hanover to Albert Warner on June 4, 1932. A true copy of said receipt is attached hereto as Exhibit "B" and hereby made a part hereof.

2. Upon receipt of said duly executed Indenture of Trust and said securities constituting the corpus of said trust, the trustees duly qualified and entered upon the performance of their duties as trustees under said Indenture, and in compliance with their duties under said Indenture collected the income upon the securities constituting the trust corpus and paid the entire amount thereof, less commissions, to the beneficiaries named in said Indenture, in accordance with the terms thereof.

3. On or about May 26, 1932, Harry M. Warner, a brother of the petitioner herein, executed an In-

denture of Trust bearing said date. A true copy of said Indenture as executed by the parties thereto is attached hereto as Exhibit "C" and hereby made a part hereof. On or before June 4, 1932, Harry M. Warner delivered [33] said Indenture to the trustees named therein, including Central Hanover, and delivered to Central Hanover on behalf of all the trustees named therein, certain securities (United States Government obligations) therein named and described of the aggregate face amount of \$2,000,000.

The securities referred to in said Indenture are described by number and amount in a receipt executed and delivered by Central Hanover to Harry M. Warner on June 4, 1932. A true copy of said receipt is attached hereto as Exhibit "D" and hereby made a part hereof.

4. Upon receipt of said duly executed Indenture of Trust and said securities constituting the corpus of said trust, the trustees duly qualified and entered upon the performance of their duties as trustees under said Indenture, and in compliance with their duties under said Indenture collected the income upon the securities constituting the trust corpus and paid the entire amount thereof, less commissions, to the beneficiaries named in said Indenture, in accordance with the terms thereof.

5. On or about May 26, 1932, Jack L. Warner (the petitioner herein), executed an Indenture of Trust bearing said date. A true copy of said Indenture as executed by the parties thereto is attached

hereto as Exhibit "E" and hereby made a part hereof. On or before June 4, 1932, Jack L. Warner delivered said Indenture to the trustees named therein, including Central Hanover, and delivered to Central Hanover on behalf of all of the trustees [34] named therein, certain securities (United States Government obligations) therein named and described of the aggregate face amount of \$2,000,000.

The securities referred to in said Indenture are described by number and amount in a receipt executed and delivered by Central Hanover to Jack L. Warner on June 4, 1932. A true copy of said receipt is attached hereto as Exhibit "F" and hereby made a part hereof.

6. Upon receipt of said duly executed Indenture of Trust and said securities constituting the corpus of said trust, the trustees duly qualified and entered upon the performance of their duties as trustees under said Indenture, and in compliance with their duties under said Indenture collected the income upon the securities constituting the trust corpus and paid the entire amount thereof less commissions, to the beneficiaries named in said Indenture, in accordance with the terms thereof.

7. All of the individuals named in the aforesaid three Indentures of Trust were alive at all times relevant hereto and are alive at the present time.

8. The income received by the aforesaid trusts and paid to the several beneficiaries under each of

the aforesaid trust during each of the following years was as follows:

Under Indenture of Trust executed by Albert Warner (Exhibit "A" hereof): [35]

	Jack L. Warner	Irma Warner	Jack M. Warner
1932: (October 17)	\$20,009.16	\$10,004.52	\$10,004.52
1933: (April 17)	35,542.25	17,774.49	17,774.49
(October 17)			
1934: (April 17)	42,391.13	21,581.76	21,195.58
(October 16)			
1935: (April 16)	37,174.97	16,678.18	18,581.60
(October 16)			

Under Indenture of Trust executed by Harry M. Warner (Exhibit "C" hereof):

	Albert Warner	Bessie L. Warner
1932: (October 17)	\$30,013.68	\$10,004.52
1933: (April 17)	53,108.55	18,018.08
(October 17)		
1934: (April 17)		
(October 16)	64,051.36	21,233.33
1935: (April 16)		
(October 16)	53,304.27	17,803.54

Under Indenture of Trust executed by Jack L. Warner (Exhibit "E" hereof):

	Rea Warner	Doris Warner (Leroy)	Betty Warner
1932: (October 17)	\$20,009.03	\$10,004.53	\$10,004.63
1933: (April 17)	35,602.13	17,774.50	17,774.50
(October 17)			
1934: (April 17)	42,466.71	21,426.50	21,426.45
(October 16)			
1935: (April 16)	35,612.93	18,135.15	18,024.58
(October 16)			

The aforesaid payments to the said beneficiaries were treated for Federal income tax purposes as the taxable income of the said beneficiaries.

9. At the time of the execution of the Trust Indentures referred to in paragraphs 1, 3 and 5 hereof, Harry M. Warner was 50 years of age and resided in Mount Vernon, New York, together with his wife, Rea Warner and his two daughters, Doris Warner (now Doris Warner LeRoy), who was born on September 13, 1912, and Betty Warner (now Betty Warner Sperling), who was born on May 4, 1920; Albert Warner was 48 years of age and resided in New York, N. Y., with his wife, Bessie L. Warner, and there has been no issue of said marriage; Jack L. Warner was 41 years of age and resided in Los Angeles, California, with his then wife, Irma Warner (from whom he has since been divorced), and Jack M. Warner, the only issue of said marriage, who was born on March 28, 1916. Lita Warner, who is referred to in Exhibit "C" hereof, is the daughter of Samuel L. Warner (brother of Harry, Albert and Jack L., who was deceased at the time of the creation of these trusts), and was born on October 10, 1926.

10. The aforesaid three Warner brothers, Harry, Albert and Jack L. (sometimes herein referred to as the "three Warner brothers" or the "three brothers"), are the principal executive officers of Warner Bros. Pictures, Inc., a Delaware corporation which acquired in 1923 the assets of a partnership composed of the three Warner brothers and

their brother Samuel L. (now deceased), [37] in consideration of the issuance to said partnership of all of the stock of said corporation. The corporation continued the business of the partnership in the production and distribution of motion pictures, and since 1926 has been the producer, distributor and exhibitor of talking motion pictures.

From 1928 until his death on April 4, 1931, Lewis Warner, the only son of Harry M. Warner, was an employee and officer of Warner Bros. Pictures, Inc., and was regarded by his father and uncles as their ultimate successor to represent the interests of the family in the corporation.

11. From January, 1926, through the first half of the year 1930, the business of Warner Bros. Pictures, Inc., rapidly expanded, the capital structure was enlarged to accord with such expansion, and the securities issued by the corporation became increasingly valuable. The common stock of the corporation was quoted as follows on the New York Stock Exchange (the quotation being the mean between the high and low quotations in the periods shown):

Date	Market Quotation
January, 1926	\$15.
September, 1926	70.
May, 1927 to April, 1928.....	35. and \$30.
September and October, 1928.....	138.
March, 1929	100.
(After 2 for 1 split)	
November, 1929	30.
March, April, May, 1930.....	80.
June, 1930	45.
August, 1930	25.
September, 1930	20.
June, 1931	5.
May, 1932	75 cents

[38]

12. During 1928 and 1929, each of the three Warner brothers, by virtue of holdings originally acquired by him, was the holder of Warner Bros. Pictures, Inc., securities having a very substantial market value.

13. The Warner brothers desired to obtain greater economic security in respect of their private fortunes, substantially all of which was represented by securities of Warner Bros. Pictures, Inc. They believed this purpose would be effectuated by improving their cash position, which would enable them to lend funds to the corporation as and when needed. Consequently, during 1928, 1929 and 1930, the three brothers disposed of substantial blocks of common stock, resulting in the accumulation of large cash reserves, which from time to time were made available to assist the corporation by loans aggregating at times between five and six million dollars.

The increasing profit in the operation of its business during the years 1929 and 1930, made it possible for Warner Bros. Pictures, Inc., to repay to the Warner brothers substantial parts of the aforesaid moneys and the balance thereof was practically entirely liquidated by new financing which the corporation obtained in September, 1930. With Warner Bros. Pictures, Inc., apparently "straightened out" financially after the refinancing, the Warner brothers, realizing the speculative character of the business and desiring to segregate a part of [39] their resources and remove the same from the hazards of the motion picture business as it then existed, began in March, 1930, to invest their cash reserves in United States Government obligations.

14. During the year 1925, the Warner brothers, together with their brother, Samuel L. Warner, who died in October 1927, formed a personal holding company called Renraw, Inc., under the laws of the State of New York, with a capital of 500 shares, 125 shares being taken by each of the four brothers. Upon the death of Samuel L. Warner, each of the three Warner brothers acquired one-third of his 125 shares in the company. On July 27, 1929, 60,000 shares of preferred stock of Renraw, Inc., were issued to the Warner brothers for \$6,000,000 in cash (which had been acquired by them through the sale of blocks of common stock of Warner Bros. Pictures, Inc.), each brother taking 20,000 shares thereof, and common stock was issued in equal parts to the three Warner brothers, in exchange

for their prior holdings of Common stock. The three brothers in July, 1929, agreed that no one or more of them would sell, transfer, hypothecate or exchange the stock owned by him in Renraw, Inc., without the prior written consent of the others.

In 1928, 1929 and 1930, the funds of Renraw, Inc., were employed partially in furtherance of the purposes referred to in the first sub-paragraph of paragraph "13" hereof, viz., [40] in loans to Warner Bros. Pictures, Inc., Renraw, Inc., being the medium through which the Warner brothers made the loans referred to in said subparagraph.

When Warner Bros. Pictures, Inc., repaid the said loans, Renraw, Inc., employed the funds so released in furtherance of the purposes referred to in the second subparagraph of paragraph "13" hereof, viz., in the purchase of United States Government obligations, Renraw, Inc., being the medium through which the Warner brothers made the purchases referred to in said subparagraph.

15. Renraw, Inc., was regarded by the Warner brothers as providing a holding company for holding the said United States Government obligations and other personal investments, and Lewis Warner was regarded by his father and uncles as the member of the family who, by virtue of his contemplated control of Renraw, Inc., would take care of the wives and children of the Warner brothers.

The death of Lewis on April 4, 1931, was a great shock to his father and had an important effect upon the plans of his father and uncles in the

arrangement of their fortunes. They could no longer look to Lewis as the one who might be expected to take care of the wives and children of the Warner family and to be the ultimate representative of the family interests in Warner Bros. Pictures, Inc. Accordingly, the Warner [41] brothers began discussions among themselves and their advisors, including Mr. Samuel Schneider, concerning the best means to be employed by them to insure the financial security of themselves and their families, and to protect that security against the exigencies and hazards of the business in which the bulk of their fortunes was invested, the speculative character of which is indicated by the fluctuations in the market values of the stock referred to in paragraph "11" hereof.

Acting through Mr. Schneider, they investigated the facilities for trust administration and were advised to consult representatives of Central Hanover, an institution which administered many trusts.

The foregoing discussions led to a decision in December, 1931, that trusts should be established, and steps were then taken to reduce the capitalization of Renraw, Inc., by the Warner brothers surrendering to it the 60,000 shares of preferred stock (20,000 each) and liquidation to the brothers equally of United States Government obligations of the face amount of \$5,600,000 and other assets of Renraw, Inc., making up the difference of \$400,000. The securities so distributed to the three brothers plus \$400,000 face amount of United States Govern-

ment obligations acquired at about that time made up the \$6,000,000 par value of United States Government obligations, \$2,000,000 of which belonged to each brother and was [42] delivered as the corpus of each trust referred to in paragraphs 1, 3 and 5 hereof. In December, 1931, each of the three Warner brothers owned a one-third interest in Renraw, Inc.

16. The Warner brothers decided that the aforesaid \$6,000,000 which ultimately became the corpora of the three trusts (Exhibits A, C and E) should be secured from the hazards of the business, secured against the actions of the brothers themselves and each other and the members of their respective immediate families, and secured for the protection of the brothers' wives and children.

17. When the Warner brothers decided that trusts were to be established to achieve these general objectives, the decision included the creation of a trust by each of the Warner brothers, identical as to corpus and otherwise substantially identical except as to beneficiaries, and they immediately sent for their personal counsel, Mr. Stanleigh P. Friedman, and explained to him the objectives desired and arranged for the representatives of Central Hanover to cooperate with him in the preparation of definitive papers.

If Stanleight P. Friedman were called as a witness he would testify in substance as follows concerning himself and his relationship to the Warner brothers and their families. He is a member of the

Bar of the State of New York and the Supreme Court of the United States and a graduate of Yale [43] University and Harvard Law School and was admitted to practice in the State of New York in 1907 and has continued to practice in that state since his graduation from Law School in 1908. He has been the advisor and counsel of the Warner brothers personally and of the corporations in which they have been interested and of members of their families from 1912 to the present time. He believes that he has at all times enjoyed the confidence and affection of the members of the Warner family.

After the decision had been reached to create trusts, and during the course of discussions between the Warner brothers and counsel, it was decided that reciprocal trusts would be created by the Warner brothers to carry out the aforesaid general objectives.

18. If Stanleight P. Friedman and the legal representatives of Central Hanover were called as witnesses, they would testify in substance as follows: That as far as the form of the trusts was concerned they advised the Warner brothers that the trusts be drawn and executed as they were finally drawn and executed, in order to secure a "maximum of irrevocability", to make it impossible for any one of the brothers to "invade the corpus", to exclude any "possibility of reverter" of the corpus of any trust to the grantor named therein, to eliminate the grantor named in each trust indenture from becoming a possible income beneficiary, to provide that in the event of the death of one of the

brothers his widow and children would not be subject to the influence of the remaining two brothers alone, [44] because each brother had his own idea of policy and was not willing to subject his estate to different philosophies of investment of the surviving brothers alone, and to minimize and avoid estate taxes, which counsel believed might be due under some different form of trust procedure. Counsel also suggested that the trusts be created before the gift tax provisions in the Revenue Bill of 1932 became enacted into law as part of the Revenue Act of 1932.

19. In the notice of deficiency duly mailed to the petitioner herein, the Commissioner has determined that the amounts of income received by the trustees and paid to the beneficiaries (other than the petitioner herein) during each of the years in question, under the Indenture of Trust executed by Albert Warner (Exhibit "A" hereof) are taxable in each of said years to the petitioner as gifts by him of said amounts to said beneficiaries in each of the said years.

In that determination the Commissioner has not included in taxable gifts of the petitioner the income received by the aforesaid trust and paid during the said years to the petitioner.

In his amended answer, the Commissioner has raised the alternative contention that the amounts of income received by the trust and paid to the beneficiaries during each of the years in question, under the Indenture of Trust [45] executed by Jack L. Warner, the petitioner herein (Exhibit "E"

hereof), are taxable in each of said years to the petitioner as gifts by him of said amounts to said beneficiaries in each of the said years.

The petitioner denies that the amounts of income received by either of the aforesaid trusts and paid to the beneficiaries thereunder during the said years are taxable in any of the said years to the petitioner as gifts by him of said amounts to said beneficiaries in any of the said years.

20. On or about May 26, 1932, Jack L. Warner (the petitioner herein) executed an Indenture of Trust bearing said date. A true copy of said Indenture as executed by the parties thereto is attached hereto as Exhibit "G" and hereby made a part hereof. On or before June 4, 1932, Jack L. Warner delivered said Indenture to the trustees named therein, including Central Hanover, and delivered to Central Hanover on behalf of all the trustees named therein, certain life insurance policies on the life of said Jack L. Warner, as named and described in Schedule "A" of the said Indenture.

21. On March 19, 1935, the aforesaid Indenture, (Exhibit "G") was duly amended so as to eliminate from the said Indenture all provisions and benefits, direct or indirect, in that trust provided for the benefit of Irma Warner or in her favor, and thereafter Jack M. Warner was the sole beneficiary of said trust. [46]

22. During the years 1932, 1933, 1934 and 1935, no income was received or paid out to the beneficiaries by the aforesaid trust (Exhibit "G").

23. In his gift tax returns for the aforesaid years the petitioner included as taxable gifts the amounts which he paid as premiums on the life insurance policies which constituted the corpus of the aforesaid trust, and no question is raised in this proceeding as to said inclusion.

24. Petitioner's gift tax return for the year 1932 showed the following:

Gross gifts made during the calendar year:

1. Premium on life insurance policies (Date of gift—8-9-32 to 12-5-32).....	\$ 6,714.18
Less total exclusions not exceeding \$5,000 for each donee (except future interests).....	None

Gross gifts for year.....\$ 6,714.18

Specific exemption claimed (not exceeding \$50,-
000 less total amount of specific exemption
claimed for preceding years)..... 6,714.18

Amount of net gifts made during calendar year None

Petitioner's gift tax return for the year 1933 showed the following: [47]

Gross gifts made during calendar year:

1. Premiums on life insurance policies (Date of gift—1-9-33 to 12-30-33).....	\$21,591.90
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Less total exclusions not exceeding \$5,000 for
each donee (except future interests)..... None

Gross gifts for year.....\$21,591.90

Specific exemption claimed (not exceeding \$50,-
000 less total amount of specific exemption
claimed for preceding years)..... 21,591.90

Amount of net gifts made during calendar year None.

Petitioner's gift tax return for the year 1934 showed the following:

Gifts during year other than charitable, public and similar gifts:

1. \$38,000. Principal amount Warner Bros. Pictures, Inc., 6% Debentures Series 1939 (Jos. H. Hazen) (Date of gift—1-5-34).....	\$15,580.00
2. \$24,000. Principal Amount Warner Bros. Pictures, Inc., 6% Debentures Series 1939 (Harold S. Bareford) (Date of gift—1-5-34).....	9,840.00
3 and 4. Mr. and Mrs. Mervyn LeRoy-Wedding Gifts ($\frac{1}{2}$ or \$7,500 to each) (Date of gift—3-8-34) and (4-5-34).....	15,000.00
5. H. M. Warner (Date of gift—3-1-34 and 9-1-34)	(5,000.00 5,000.00)
6. Albert Warner (Date of Gift—3-1-34 and 9-1-34)	(5,000.00 5,000.00)
7 and 8. Central Hanover Bank & Trust Co. et al., Trustees under Insurance Trust Indenture dated May 26, 1932. Donor paid life insurance premiums (net) on policies assigned to Trustees. There are two donee beneficiaries of said trusts. (Date of gift—various)	22,062.00
Total.....	\$82,482.00

[48]

Forward.....\$82,482.00

Less total exclusions not exceeding \$5,000 for each donee (except future interests) (Eight donees) 40,000.00

Included amount of gifts for year other than charitable, etc. gifts.....\$42,482.00

Specific exemption claimed (not exceeding \$50,000 less total amount of specific exemption claimed for preceding years)..... 42,482.00

Amount of net gifts for year..... None

Adjustments were made by the Commissioner to the aforesaid gift tax return for 1934, and a notice of deficiency was mailed to the petitioner determining a deficiency in gift tax on the basis of such adjustments. When no appeal was taken to the Board of Tax Appeals from the said determination of deficiency, the gift tax deficiency so determined was assessed. The following schedule shows the said adjustments made by the Commissioner:

	<u>Returned</u>	<u>Determined</u>
Total Gifts—1934	\$82,482.00	\$84,073.33*
Less exclusions	40,000.00	30,000.00
Amount included	42,482.00	54,073.33
Less specific exemption.....	42,482.00	21,693.92
Net gifts—1934	0.00	32,379.41
Tax on net gifts.....	0.00	521.38
Tax assessed on return.....		0.00
Deficiency		521.38

*This increase resulted from uncontested increases in the amounts of the gifts shown as items 1 and 2 on the gift tax return for 1934.

[49]

The following explanatory statements were made by the Commissioner with reference to the aforesaid determination:

“Two exclusions in the amount of \$10,000, claimed with respect to the premiums paid on the life insurance policies placed in trust under the trust indenture dated May 26, 1932, are disallowed. As it appears that no payments will be made to the beneficiaries of the trust until your

death, the gifts are considered to be gifts of future interests, against which no exclusions are allowable.

“Specific exemption in the amount of \$21,-693.92 is allowed, the remainder of the specific exemption provided by statute having been claimed by you on returns filed for the calendar years 1932 and 1933.”

Petitioner's gift tax return for the year 1935 showed the following:

Schedule A.—Gifts during year other than charitable, public, and similar gifts:

1. Life Insurance Premiums on Policies payable to a beneficiary under Trust Indenture as amended March 19, 1935—Central Hanover Bank and Trust Company of New York, Trustees. (Date of gift—1935).....\$22,014.78

Less total exclusions not exceeding \$5,000 for each donee (except future interests)—

One donee 5,000.00

Included amount of gifts for year other than charitable, etc., gifts..... 17,014.78

Schedule C.—Returns, amounts of specific exemption, and net gifts for preceding years (subsequent to June 6, 1932): [50]

<u>Calendar Year</u>		<u>Amount of Specific Exemption</u>	<u>Amount of Net Gifts</u>
1932	\$6,714.18 (2) donee deductions \$		None
1933	21,591.90 (2) donees “ 10,000.00	11,591.90	None
1934	84,073.33 40,000.00 less for (8) donees.....	38,408.10	5,665.23
	44,073.33 Balance		
Total amount of specific exemption claimed for preceding years.....		\$50,000.00	
Total amount of net gifts for preced- ing years			5,665.23

Computation of amount of net gifts for year:

1. Amount of gifts for year other
than charitable, etc., gifts.....\$17,014.78
2. Amount of charitable, public and
similar gifts for year..... None
3. Total amount of gifts for year..... \$17,014.78
4. Amount of charitable, public and
similar gifts for year.....\$ None
5. Specific exemption claimed (not
exceeding \$50,000, less total
amount of specific exemption
claimed for preceding years)..... None
6. Total deductions None
7. Amount of net gifts for year..... \$17,014.78

Computation of tax:

1. Amount of net gifts for year.....	\$17,014.78
2. Total amount of net gifts for preceding years.....	5,665.23
3. Total net gifts.....	22,680.01
4. Tax computed on item 3.....	285.30
5. Tax computed in item 2 (no payment yet made)	None
6. Tax on net gifts for year.....	285.30

STANLEIGH P. FRIEDMAN

Attorney for Petitioner

J. P. WENCHEL

ECA

Chief Counsel, Bureau of Internal Revenue. [52]

EXHIBIT "A"

This trust indenture made the 26th day of May, 1932, between Albert Warner, as Grantor, and Harry M. Warner, Albert Warner, Jack L. Warner, Stanleigh P. Friedman and Central Hanover Bank and Trust Company, a corporation organized and existing under the banking laws of the State of New York, as Trustees,

Witnesseth:

The Grantor is desirous of creating a trust for the purposes and upon the terms and provisions hereinafter set forth. Accordingly, the Grantor has herewith transferred, assigned and conveyed to the Trustees and the Trustees do hereby, by the execu-

tion of these presents, acknowledge receipt from the Grantor of the property described in Schedule A hereto annexed, which, together with any property which may hereafter be conveyed, subject to the trusts hereby created, to the Trustees by the Grantor or by any other person, all of which is hereinafter collectively termed the trust estate, shall be held and disposed of by the Trustees and the survivors or survivor of them and their successors and assigns upon the following trusts, namely:

1. (a) The Trustees shall hold, manage, invest and from time to time reinvest the trust estate.

(b) The Trustees shall set aside such portion of the trust estate as shall equal at the market value thereof at the time of setting aside the same one-quarter thereof and shall hold the same in trust for Irma Warner, wife of Jack L. Warner, hereinafter called Irma, paying over to her the entire net annual income therefrom in each year during her life, and upon the death of Irma, in case Jack L. Warner, hereinafter called Jack shall survive her, the Trustees shall continue to hold said fund in trust for Jack, paying over to him the entire net annual income therefrom in each year during his life and upon his death, he having survived Irma, the Trustees shall transfer, assign and pay over the said fund to Jack M. Warner, son of Jack and Nephew of the Grantor, hereinafter calle Jackie, in case he shall survive Jack; or if Jackie shall not survive Jack but shall leave a widow surviving Jack, the Trustees shall transfer, assign and pay over such portion of

said fund as Jackie shall by his last will and testament duly admitted to probate direct to said surviving widow of Jackie, provided, however, that Jackie shall have no right to direct the payment to his said surviving widow of more than such portion of said fund as shall equal at the market value thereof at the time of Jack's death one-quarter thereof, and the Trustees shall transfer, assign and pay over the balance of said fund or the entire amount of said fund, in case Jackie shall either leave no widow surviving Jack or shall fail to direct the payment to his widow of any portion of said fund, to the issue of Jackie who shall survive Jack in equal shares, per stirpes and not per capita; or if no issue of Jackie shall survive Jack to those persons who would be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if Jack had died seized and possessed of the same and intestate at that time.

In case Jack shall not survive Irma but Jackie shall survive her, the Trustees shall continue to hold said fund in trust for Jackie, paying over to him the entire net annual income therefrom in each year during his life and upon the death of Jackie, or upon the death of Irma in case Jackie shall not survive her, if Jackie shall leave a widow then living, the Trustees shall transfer, assign and pay over to the surviving widow of Jackie such portion of said fund as Jackie shall by his last will and testament duly admitted to probate direct, provided

however, that Jackie shall have no right to direct the payment to his said surviving widow of more than such portion of said fund as shall equal at the market value thereof at the time of the death of the survivor of Irma and Jackie one-quarter thereof, and the Trustees shall transfer, assign and pay over the balance of said fund or the entire amount thereof, in case Jackie shall either leave no widow then living or shall fail to direct the payment of any portion of said fund to his said surviving widow, to the issue of Jackie who shall be then living in equal shares, per stirpes and not per capita; or if no issue of Jackie shall be then living to those persons who would be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if Jack had died seized and possessed of the same and intestate at that time.

(c) The Trustees shall set aside such portion of the trust estate as shall equal at the market value at the time of setting aside the same one-quarter thereof, and shall hold the same in trust for Jackie, paying over to him the entire net annual income therefrom in each year during his life, and upon the death of Jackie in case Jack shall survive Jackie, the Trustees shall continue to hold said fund in trust for Jack, paying over to him the entire net annual income therefrom in each year during his life and upon his death, he having survived Jackie, if Jackie shall leave a widow surviving Jack, the Trustees shall transfer, assign and pay over so much of said

fund as Jackie shall by his last will and testament duly admitted to probate direct to the said surviving widow of Jackie, provided, however, that Jackie shall have no right to appoint to his said surviving widow more than such portion of the said fund as shall equal at the market value thereof at the time of Jack's death one-quarter thereof, and the Trustees shall transfer, assign and pay over the balance of said fund or the entire amount thereof, in case Jackie shall either leave no widow surviving Jack or shall fail to appoint to his surviving widow any portion of said fund, to the issue of Jackie who shall survive Jack in equal shares, per stirpes and not per capita; or if no issue of Jackie shall survive Jack to Irma, or if Irma shall not survive Jack, to those persons who would be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if Jack had died seized and possessed of the same and intestate at that time.

In case Jack shall not survive Jackie but Jackie shall leave a widow him surviving, the Trustees shall upon the death of Jackie transfer, assign and pay over so much of said fund as Jackie shall by his last will and testament duly admitted to probate direct to the surviving widow of Jackie, provided, however, that Jackie shall have no right to direct the payment to his said surviving widow of more than such portion of said fund as shall equal at the market value thereof at the time of his death one-quarter thereof, and the Trustees shall upon the death

of Jackie, transfer, assign and pay over the balance of said fund or the entire amount thereof in case Jackie shall either leave no widow him surviving or shall fail to appoint to his surviving widow any portion of said fund to the surviving issue of Jackie in equal shares, per stirpes and not per capita; or if Jackie shall leave no issue him surviving, the Trustees shall continue to hold the same in trust for Irma in case she shall survive Jackie, paying over to her the entire net annual income therefrom in each year during her life, and upon the death of Irma or upon the death of Jackie in case Irma shall not survive Jackie, the Trustees shall transfer, assign and pay over the same to those persons who would be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if Jack had died seized and possessed of the same and intestate at that time.

(d) The Trustees shall set aside such portion of the trust estate as shall equal at the market value thereof at the time of setting aside the same one-quarter thereof and shall hold the same in trust for Jack, paying over to him the entire net annual income therefrom in each year during his life.

Upon the death of Jack in case Irma shall survive him, the Trustees shall continue to hold said fund in trust for Irma and shall pay over to her the entire net annual income therefrom in each year during her life, and upon her death, she having survived Jack, the Trustees shall transfer, assign

and pay over the said fund to Jackie in case he shall be then living, or if Jackie shall not be then living but shall leave a widow then living the Trustees shall transfer, assign and pay over such portion of said fund as Jackie shall by his last will and testament duly admitted to probate direct to said surviving widow of Jackie, provided, however, that Jackie shall have no right to direct the payment to his said surviving widow of more than such portion of said fund as shall equal at the market value thereof at the time of the death of Irma one-quarter thereof, and the Trustees shall transfer, assign and pay over the balance of said fund or the entire amount thereof, in case Jackie shall either leave no widow then living or shall fail to appoint to his surviving widow any portion of said fund, to the issue of Jackie who shall be then living in equal shares, per stirpes and not per capita; or if no issue of Jackie shall be then living to those persons who would be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if Jack had died seized and possessed of the same and intestate at that time.

In case Irma shall not survive Jack, the Trustees shall from and after the death of Jack continue to hold said fund in trust for Jackie in case he shall survive Jack and shall pay over to him the entire net annual income therefrom in each year during his life, and upon the death of Jackie or upon the death of Jack in case Jackie shall not survive Jack,

if Jackie shall leave a widow then living the Trustees shall transfer, assign and pay over such portion of said fund as Jackie shall by his last will and testament duly admitted to probate direct to the said surviving widow of Jackie, provided, however, that Jackie shall have no right to direct the payment to his said surviving widow of more than such portion of said fund as shall equal at the market value thereof at the time of the death of the survivor of Jack and Jackie one-quarter thereof, and the Trustees shall transfer, assign and pay over the balance of said fund or the entire amount thereof, in case Jackie shall either leave no widow then living or shall fail to appoint to his surviving widow any portion of said fund, to the issue of Jackie who shall be then living in equal shares, per stirpes and not per capita; or if no issue of Jackie shall be then living to those persons who would be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if Jack had died seized and possessed of the same and intestate at that time.

(e) The Trustees shall set aside such portion of the trust estate as shall equal at the market value thereof at the time of setting aside the same one-quarter thereof, and shall hold the same in trust for Jack paying over to him the entire net annual income therefrom in each year during his life.

Upon the death of Jack in case Jackie shall survive Jack, the Trustees shall continue to hold said fund in trust for Jackie and shall pay over to him

the entire net annual income therefrom in each year during his life and upon the death of Jackie, he having survived Jack, if Jackie shall leave a widow him surviving the Trustee shall transfer, assign and pay over so much of said fund as Jackie shall by his last will and testament duly admitted to probate direct to the said surviving widow of Jackie, provided, however, that Jackie shall have no right to appoint to his said surviving widow more than such portion of said fund as shall equal at the market value thereof at the time of his death one-quarter thereof, and the Trustees shall transfer, assign and pay over the balance of said fund or the entire amount thereof, in case Jackie shall either leave no widow him surviving or shall fail to appoint any portion of said fund to his said surviving widow, to the surviving issue of Jackie in equal shares, per stirpes and not per capita; or if Jackie shall leave no issue him surviving, to Irma or if she shall not survive Jackie to those persons who would be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if Jack had died seized and possessed of the same and intestate at that time.

In case Jackie shall not survive Jack, the Trustees shall upon the death of Jack, if Jackie shall leave a widow surviving Jack, transfer, assign and pay over so much of said fund as Jackie shall by his last will and testament duly admitted to probate direct to the surviving widow of Jackie, provided, however, that Jackie shall have no right to direct

the payment to his surviving widow of more than such portion of said fund as shall equal at the market value thereof at the death of Jack one-quarter thereof, and the Trustees shall transfer, assign and pay over the balance of said fund or the entire amount thereof in case Jackie shall either leave no widow surviving Jack or shall fail to appoint to his surviving widow any portion thereof to the issue of Jackie who shall survive Jack in equal shares, per stirpes and not per capita; or if no issue of Jackie shall survive Jack the Trustees shall hold such portion of said fund, as would have been paid to the issue of Jackie if any issue of Jackie had survived Jack, in trust for Irma paying over to her the entire net annual income therefrom in each year during her life and upon her death or upon the death of Jack in case she shall not survive Jack, the Trustees shall transfer, assign and pay over the same to those persons who would be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if Jack had died seized and possessed of the same and intestate at that time.

(f) During the minority of any beneficiary, the Trustees may use and apply so much of the net annual income payable to such beneficiary under the provisions hereof, for the benefit, support, education, comfort, welfare and maintenance of such minor beneficiary as they may deem advisable, accumulating any balance of income, and upon such beneficiary attaining the age of twenty-one years,

the Trustees shall transfer, assign and pay over to such beneficiary all the income accumulated for his or her benefit.

(g) Anything herein contained to the contrary notwithstanding, in case any share or portion of the trust estate shall vest in the possession of any minor beneficiary, the Trustees shall retain and shall hold, manage, invest and from time to time reinvest the same and shall use and apply so much of the net annual income therefrom for the benefit, support, education, comfort, welfare and maintenance of such beneficiary as they shall deem advisable, accumulating any balance of income not so used or applied, and upon any such beneficiary attaining the age of twenty-one years, the Trustees shall transfer, assign and pay over to such beneficiary the entire principal of his or her share and all accumulations of income thereon; provided, however, that nothing herein contained shall be deemed to postpone the vesting of any such share or portion and in case any such minor beneficiary shall die before attaining the age of twenty-one years, the principal of his or her share or portion together with all accumulations of income thereon shall form a part of his or her estate and shall be disposed of accordingly.

(h) Instead of making personal application of income for the use of any minor beneficiary, the Trustees may transfer, assign and pay over so much of such income as they may deem advisable to either parent or the guardian of the person or property

of such minor beneficiary to be by him or her applied to the benefit, support, education, comfort, welfare and maintenance of such minor beneficiary. The Trustees shall be fully protected in any payments of income so made to such parent or guardian and shall not be responsible for the same but their whole duty and responsibility shall cease upon the making of any such payment.

2. It shall not be lawful for any beneficiary entitled to receive income under any provision hereof to sell, assign, encumber, charge or dispose of by way of anticipation or otherwise the income payable to any such beneficiary or any part thereof and notwithstanding any such charge, sale, assignment or other disposition, the Trustees are hereby required to pay such income into the proper hands of such beneficiary for his or her separate and peculiar use and benefit, whether married or single, upon his or her own receipt. Nor shall such income or any part thereof be in any wise liable to any claim of any creditor of any such beneficiary.

3. Subject to the restrictions and limitations herein contained, the Trustees and the survivors or survivor of them and their successors and assigns shall have the following powers, authority and discretion, namely:

To continue to hold upon the trusts hereby created any or all of the property herewith or hereafter conveyed to the Trustees. Nevertheless, in case it shall seem to the Trustees advisable so to do, the Trustees may from time to time sell or dispose

of all or any part of the same or of any other property which may at any time constitute the trust estate. The Trustees may invest and from time to time reinvest the proceeds of sale of any of the trust property or any cash held in trust in the public stocks or obligations of the United States of America or of any State thereof, or of any County or City of the following States, namely: New York, New Jersey, Massachusetts, Pennsylvania, Ohio, Illinois, Maine, Rhode Island, Maryland and California, whether or not the same be legal investments for trustees under the laws of the State of New York, and the Trustee shall be so limited and restricted in making any investment or reinvestment of the proceeds of sale of any of the trust property or any cash held in trust, but nothing herein contained shall be construed to prohibit the trustees from retaining in the form in which the same may be invested at the time that the same is conveyed to them any or all of the property herewith or hereafter conveyed to the Trustees.

The Trustees may become a party to any reorganization, consolidation, merger or other capital readjustment of any corporation, the stocks or securities of which may at any time be held in trust. They may participate in any such reorganization, consolidation, merger or readjustment to the same extent and as fully as though they were the absolute and individual owners of such stocks or securities, and may deposit with any committee or depositary, pursuant to any plan or agreement of

reorganization, consolidation, merger or readjustment, any property held in trust and may make payment from the principal of the trust estate of any charges or assessments imposed by the terms of any plan or agreement of reorganization, consolidation, merger or readjustment, and may receive and continue to hold in trust any property allotted to the trust estate by reason of their participation therein, whether or not the same is an investment of the character hereinabove permitted to the Trustees.

The Trustees may exercise conversion or subscription rights appurtenant to any stocks, bonds or other securities at any time held in trust, and may use such portion of the principal of the trust estate as may be necessary therefor, whether or not the property resulting from the exercise of any such right will be an investment of the character hereinabove permitted to the Trustees, or in the discretion of the Trustees may sell any such rights. Investments made through the exercise of any such rights or proceeds received on the sale thereof shall be considered principal.

The Trustees shall not be required to establish any sinking fund to amortize the premium at which any investment or reinvestment may be purchased.

All extraordinary dividends and all realized appreciation in the value of stocks, bonds, securities or other property resulting from the sale or other disposition thereof shall, so far as permitted by law, be considered principal and not income, but

ordinary stock dividends paid regularly by a corporation in lieu of, or in addition to regular cash dividends, shall be considered income and not principal; provided, however, that the Trustees' determination as to whether any dividend should be apportioned or allocated in whole or in part to principal or income shall, so far as permitted by law, be conclusive and binding upon all persons now or hereafter interested in the trust estate. The Trustees unless otherwise provided herein, may pay out of the income received from the trust estate all expenses of the trust and all taxes which may be properly assessed against the trust estate or any beneficiary thereof.

The Trustees may hold the trust estate or any part thereof as an undivided whole without separation as between the trusts hereby created, but no such holding shall defer the vesting of any estate in possession, or otherwise, according to the terms hereof. The Trustees may compromise, adjust, settle and compound or submit to arbitration on such terms as may seem advisable to them in their discretion, any claims in favor of the trust estate or against the trust estate.

For convenience of administration, the Trustees may cause any stocks, securities or property at any time held in trust to be registered in the name of the nominee or nominees of the Trustees or in the name of the Corporate Trustee without disclosure of its trust capacity, or may hold any stocks or securities in bearer form, so that they will pass by

delivery, but no such registration shall relieve the Trustees from responsibility for the acts of their nominee or nominees or from liability for the safe custody of any such stocks, securities or other property or from responsibility for the acts of their nominee or nominees.

The Trustees may make distribution of the trust estate in kind or in cash, or partly in kind and partly in cash, and the determination of the Trustees as to the fairness and equality of any such distribution shall be conclusive upon all persons entitled to receive any share of the trust estate.

The Trustees shall not be liable for any loss or depreciation in the value of the trust estate occurring by reason of error of judgment in making any sale or investment or reinvestment, or in continuing to hold in trust any property herewith or hereafter transferred to the Trustees or any investment or reinvestment hereafter made, unless they shall have failed to act in good faith or with reasonable care.

The Trustees shall not be required to furnish any bond or security for the performance of their duties hereunder.

The Trustees may sell for cash or upon credit and may mortgage or partition upon such terms as they may deem advisable any real estate at any time held in trust. The Trustees may make, execute and deliver leases or renewals of leases for terms not exceeding for any lease or renewal of lease

twenty-one years without making application to the court.

4. Anything herein contained to the contrary notwithstanding, the Grantor or any delegate or delegates appointed by him pursuant to the provisions hereof, and Harry M. Warner or any delegate or delegates appointed by him pursuant to the provisions hereof, and Jack L. Warner or any delegate or delegates appointed by him pursuant to the provisions hereof so long as the Grantor and Harry M. Warner and Jack L. Warner are all living, shall have the right jointly and unanimously to direct the sale or other disposition by the Trustees of the whole or any part of the trust property and the investment or reinvestment of any cash in the hands of the Trustees in such of the securities which are hereinabove permitted to the Trustees as they may wish, but no others, and shall also have the right jointly and unanimously to direct the exercise or non-exercise by the Trustees of any right of conversion or subscription and the participation or non-participation or manner of participation by the Trustees in any reorganization, consolidation, merger or other capital readjustment of any corporation, the stocks or securities of which are at any time held in trust, and shall solely, and to the exclusion of the Corporate Trustee, be vested with all of the discretionary powers and privileges hereinbefore and in Articles 1 and 3 of this Indenture granted to the Trustees, and the Trustees shall have no power to sell or otherwise dispose of the whole

or any part of the trust property or invest or reinvest any cash in the hands of the Trustees, or take any action with reference to any conversion or subscription right or with reference to any reorganization, consolidation, merger or other capital readjustment of any corporation, the stocks or securities of which are at any time held in trust, except as they are jointly and unanimously directed by the Grantor or any delegate or delegates appointed by him pursuant to the provisions hereof, and Harry M. Warner or any delegate or delegates appointed by him pursuant to the provisions hereof and Jack L. Warner or any delegate or delegates appointed by him pursuant to the provisions hereof, in accordance with the provisions hereof so long as the Grantor and Harry M. Warner and Jack L. Warner are all living. In case the Grantor or Harry M. Warner or Jack L. Warner shall die, Stanleigh P. Friedman shall, for the purpose of this paragraph, be substituted in the place and stead of the one so dying and said Stanleigh P. Friedman and the two survivors of the Grantor and Harry M. Warner and Jack L. Warner or any delegate and/or delegates appointed by either or both of said two survivors pursuant to the provisions hereof shall have all the rights and powers conferred upon the Grantor and Harry M. Warner and Jack L. Warner or the delegate or delegates of any one or more of them so long as all three are living. In case said Stanleigh P. Friedman shall die either before or after the death of the one of the following

persons first to die but before the death of the second of the one of the following persons second to die, namely, the Grantor and Harry M. Warner and Jack L. Warner, the Grantor and Harry M. Warner and Jack L. Warner so long as all three are living and the two survivors of them in case only two of them shall be living shall have the right from time to time, by instrument under their hands and seals duly acknowledged in the form required to entitle a conveyance of real property to be recorded in the State of New York and delivered to the Trustees, to jointly and unanimously appoint a substitute in the place and stead of said Stanleigh P. Friedman and in case any substitute so appointed by them as aforesaid shall die, to from time to time appoint another substitute in the place and stead of any substitute who shall die, and after the death of the Grantor or Harry M. Warner or Jack L. Warner and said Stanleigh P. Friedman any substitute appointed in accordance with the provisions hereof and the two survivors of the Grantor and Harry M. Warner and Jack L. Warner or any delegate and/or delegates appointed by either or both of said two survivors pursuant to the provisions hereof, shall have all the powers and authority conferred upon the Grantor and Harry M. Warner and Jack L. Warner or the delegate or delegates of any one or more of them, so long as all three are living. In case either the Grantor or Harry M. Warner or Jack L. Warner shall be deceased, the provisions of this Article 4 shall be in-

operative during any period in which there is no substitute for said Stanleigh P. Friedman duly appointed, qualified and acting. In case two of the following persons shall die, namely, the Grantor and Harry M. Warner and Jack L. Warner, the provisions of this Article 4 from and after the happening of such event shall become inoperative and shall be null and void and of no effect. Said Stanleigh P. Friedman or any other substitute appointed in accordance with the provisions hereof may at any time resign by an instrument under his hand and seal and duly acknowledged and filed with the Trustees, and in the event of the resignation of said Stanleigh P. Friedman or any other substitute appointed in accordance with the provisions hereof, or in case Stanleigh P. Friedman or any other substitute appointed in accordance with the provisions hereof shall be unable to act hereunder on account of sickness, the Grantor and Harry M. Warner and Jack L. Warner so long as all three are living or the two survivors of them, if only two of them shall be living, shall have the right from time to time to appoint a new substitute in the place and stead of said Stanleigh P. Friedman or any other substitute who shall so resign or be unable on account of sickness to act hereunder, and any such substitute shall have all the powers, authority and discretion of the person in whose place and stead he or she was appointed; provided, however, that in case any substitute shall be appointed to act in the place and stead of said Stanleigh P. Friedman

or any other substitute appointed in accordance with the provisions hereof, on account of the inability of said Stanleigh P. Friedman or any other substitute appointed in accordance with provisions hereof to act hereunder on account of sickness, the appointment of such substitute shall only continue and be effective so long as said Stanleigh P. Friedman or any other substitute named in accordance with the provisions hereof shall be unable to act on account of sickness, and if such inability shall cease the appointment of such new substitute shall from and after such time be inoperative and of no effect and said Stanleigh P. Friedman or any other substitute who was unable to act on account of sickness shall, from and after the time that any such inability shall cease, have all the rights, power, authority and discretion that he had prior to the commencement of such inability. The Grantor and Harry M. Warner and Jack L. Warner, so long as all three are living, and the two survivors of them in case only two of them shall be living, shall be the judges as to whether said Stanleigh P. Friedman or any other substitute appointed in accordance with the provisions hereof is unable on account of sickness to act hereunder, and the Trustee shall be fully protected in relying upon the written statement of the Grantor and Harry M. Warner and Jack L. Warner, so long as all three are living, or the two survivors of them in case only two of them shall be living, that said Stanleigh P. Friedman or any other substitute appointed in accordance with

the provisions hereof is unable on account of sickness to act hereunder. The Grantor or Harry M. Warner or Jack L. Warner shall each have the right by an instrument under his hand and seal, duly acknowledged and delivered to the Trustees, at any time so long as the provisions of this Article 4 shall continue operative to any time and from time to time and for any reason to delegate any or all of the powers, authority or discretion given to him by this Article 4 to such person or persons as he may name, who may be either one of the others or the two others of the said Grantor, Harry M. Warner and Jack L. Warner, or any other person or persons, and at any time and from time to time by an instrument under his hand and seal, duly acknowledged and delivered to the Trustees to revoke any such delegation, provided, however, that any such delegation shall remain in full force and effect unless and until the same is revoked by the person making the delegation in the manner herein set forth, or unless and until the death of the person making the delegation or unless and until the provisions of this paragraph shall become inoperative by reason of the death of two of the following persons, namely, the Grantor and Harry M. Warner and Jack L. Warner. The Trustees shall be fully protected in acting upon any direction of the Grantor and said Harry M. Warner and Jack L. Warner, and any delegate or delegates or substitute or substitutes named in accordance with the provisions hereof, and shall not be liable for any de-

preciation or loss resulting to the trust estate from any action taken or omitted to be taken under the direction of the Grantor and said Harry M. Warner and Jack L. Warner and their delegate or delegates or substitute or substitutes named in accordance with the provisions hereof, nor shall the Trustees be liable for any loss or depreciation resulting to the trust estate by reason of their inability to act because of the provisions of this Article 4.

5. Harry M. Warner, Jack L. Warner and Stanleigh P. Friedman, and the survivors and survivor of them, shall have the right and power at any time and from time to time during their lives by deed or other instrument executed and acknowledged in the form required by law to entitle a conveyance of real property to be recorded, to revoke this Trust Indenture or to alter or amend any term or provision thereof in any way or to any extent that may seem to them, or the survivors or survivor of them, desirable except that they and the survivors or survivor of them shall have no power to diminish the compensation of the Corporate Trustee, and no person except to the extent herein expressly stated shall have any right, title, interest or estate in or to the trust estate or under any term or provision of this Trust Indenture, except subject to the revocation, alteration or amendment of this Indenture, and the rights, titles, interests and estates created hereby in accordance with the provisions of this Article 5. Upon the delivery to the Trustees by said Harry M. Warner, Jack L. Warner and Stanleigh P. Fried-

man, or the survivors or survivor of them, of said deed or other instrument so signed and acknowledged by said Harry M. Warner, Jack L. Warner and Stanleigh P. Friedman and/or the survivors or survivor of them, this Trust Indenture shall be revoked, altered or amended in the manner or to the extent therein set forth. The term "revocation" as herein used shall include a total or partial revocation. In case this Indenture and the trusts hereby created shall be revoked in whole or in part, the property constituting the trust estate or so much thereof as to which the trust is revoked shall be transferred, assigned and delivered by the Trustees to Jack L. Warner or to the estate of Jack L. Warner, if he be deceased. In case of a partial revocation, the person or persons having the right to revoke under the provisions of this Article 5 shall have the right to direct from what portion of the trust estate still held in trust under the provisions of this Indenture at the time of such revocation the property as to which this trust is revoked shall be withdrawn, and in the absence of any such direction if this Trust Indenture and the trusts hereby created shall be partially revoked, the amount as to which the trust is revoked shall be taken proportionately from all funds then held in trust subject to the terms of this Indenture.

Nothing in this Article 5 contained shall be deemed to confer upon said Harry M. Warner, Jack L. Warner and Stanleigh P. Friedman and/or the survivors or survivor of them the right or power in

any way to affect the disposition herein contained or alter the terms and provisions of this Indenture with reference to any property held subject to the provisions of this Indenture, which has become vested in the possession of any person and presently payable and distributable by the Trustees under the provisions of this Indenture but which has not in fact been paid and distributed by the Trustees, or with reference to any property held subject to the provisions of this Indenture which has vested in the possession of any person under the provisions of this Indenture, the payment of which is postponed by any provision of this Indenture.

6. The Trustees or any one or more of them may at any time resign by mailing to the other Trustees and to the beneficiaries who at the date of such resignation may be entitled to the enjoyment of the income from the trust estate, or to their respective representatives, at their last known post offices addresses, respectively, a written notification of such resignation and thereupon shall be entitled to apply to any court having jurisdiction in the premises for the judicial settlement of their accounts as Trustees or Trustee hereunder.

7. This Trust Indenture shall be construed according to the laws of the State of New York where the trust estate is to be administered.

8. Anything herein contained to the contrary notwithstanding, wherever in this Indenture Jackie is given the right by his last will and testament, in case he shall be deceased, to appoint or direct the

payment of a part, portion or fraction of any share or portion of the trust estate which he would have been entitled to receive, if living, to his widow if he shall leave a widow living at the time of distribution of any such share or portion, the term "widow" as herein used shall include his widow to whom he was legally married at the time of his decease, whether or not such widow shall have remarried.

9. In case Stanleigh P. Friedman shall die or resign or for any other reason cease to be a Trustee hereunder, the Grantor and Harry M. Warner and Jack L. Warner and the survivors or survivor of them shall have the right, by instrument under their hands and seals duly acknowledged in the form required to entitle a conveyance of real property to be recorded in the state of New York and delivered to the Trustees, to from time to time appoint a substitute or successor trustee in the place and stead of said Stanleigh P. Friedman and in case any substitute or successor trustee so nominated or appointed shall die or resign or for any other reason cease to act as trustee hereunder, to from time to time appoint another substitute or successor trustee in the place and stead of any substitute or successor trustee who shall die or resign or for any other reason cease to act as trustee hereunder. Any substitute or successor trustee so appointed shall in all respects be substituted in the place and stead of said Stanleigh P. Friedman and shall have all the rights, powers, authorities, privileges and title here-

in conferred upon or vested in said Stanleigh P. Friedman.

10. The Grantor and Harry M. Warner and Jack L. Warner and Stanleigh P. Friedman, and the survivors or survivor of them shall have the right and power, by instrument under their hands and seals, duly acknowledged in the form required to entitle a conveyance of real property to be recorded in the State of New York, and delivered to the Trustees, to at any time remove the Corporate Trustee, Central Hanover Bank and Trust Company, and to appoint a new Corporate Trustee in the place and stead of the Corporate Trustee herein named, and also to from time to time remove any Successor Corporate Trustee at any time appointed in accordance with any provision of this Article 10 and appoint another Corporate Trustee in the place and stead thereof; provided, however, that any Corporate Trustee appointed in accordance with any provision of this Article 10 shall be a banking corporation authorized to do business in the State of New York and having its principal office and place of business in the Borough of Manhattan and City of New York; provided, further, that no such instrument removing the Corporate Trustee herein named or any other Corporate Trustee appointed pursuant to any provision of this Article 10 shall be effective until another Corporate Trustee authorized to transact business in the State of New York and having its principal office and place of business in the Borough of Manhattan and City of New York,

shall have been appointed in the place and stead thereof, it being the intention of the Grantor that there shall always be a Corporate Trustee acting under the terms and provisions of this Indenture so long as any trust created by this Indenture shall continue in operation. The term "Trustees" as used in this Indenture shall include any Corporate Trustee appointed in accordance with any provision of this Article 10, and any such Corporate Trustee which shall be appointed shall have all the rights, powers, authorities, privileges and title herein conferred upon the Corporate Trustee, Central Hanover Bank and Trust Company. In case the Corporate Trustee herein named or any Successor Corporate Trustee at any time appointed in accordance with any provision of this Article 10 shall resign or for any other reason cease to act as a trustee hereunder, the Grantor and Harry M. Warner and Jack L. Warner and Stanleigh P. Friedman, and the survivors or survivor of them shall have the right and shall be under a duty by an instrument under their hands and seals and duly acknowledged and delivered to the Trustees, to appoint another Corporate Trustee in the place and stead of any such Corporate Trustee which has ceased to act as a trustee hereunder. In case at any time there shall be no Corporate Trustee acting hereunder, and the Grantor and Harry M. Warner and Jack L. Warner and Stanleigh P. Friedman, and the survivors or survivor of them shall fail within sixty days after there shall fail to be a Cor-

porate Trustee acting hereunder to appoint a new Corporate Trustee, or in case all of said persons shall be deceased, any Court of the State of New York having jurisdiction for the purpose may appoint a new Corporate Trustee hereunder with all the rights, title, interests, powers, authorities and privileges given to the Corporate Trustee herein named.

11. All acts and decisions of the Trustees, as trustees, shall be unanimous except where powers are herein vested exclusively in individual trustees or their delegates or substitutes, in which cases they must also act jointly and unanimously, and except as herein otherwise expressly set forth.

12. Whenever in the administration of the trusts hereby created, it shall become necessary for the Trustees to engage legal counsel or employ accountants, so long as there shall be individual Trustees or an individual Trustee acting under the provisions hereof, the individual Trustees or individual Trustee who shall be acting at such time, whether or not such individual Trustees or Trustee be named herein or be a successor trustee appointed in accordance with the provisions hereof, shall have the right to decide what person or persons shall be engaged as legal counsel by the Trustees or engaged as accountants by the Trustees.

In witness whereof, Albert Warner has hereunto set his hand and seal both as Grantor and as Trustee, and Harry M. Warner, Jack L. Warner and Stanleigh P. Friedman have hereunto set their

hands and seals, and Central Hanover Bank and Trust Company has caused these presents to be executed and its corporate seal to be hereunto affixed by its officers thereunto duly authorized, the day and year above written.

(Signed) ALBERT WARNER (L. S.)

As Grantor

(Signed) HARRY M. WARNER (L. S.)

As Trustee

(Signed) ALBERT WARNER (L. S.)

As Trustee

(Signed) JACK L. WARNER (L. S.)

As Trustee

(Signed) STANLEIGH P. FRIEDMAN (L. S.)

As Trustee

(Seal) CENTRAL HANOVER BANK AND
TRUST COMPANY

Attest: By B. W. READ (Signed)

Asst. Vice President

As Trustee

L. F. RANDOLPH (Signed)

Assistant Secretary

EXHIBIT "G"

INSURANCE TRUST INDENTURE

Between

Jack L. Warner

Grantor

and

Albert Warner, Harry M. Warner, Stanleigh P.

Friedman and Central Hanover Bank

and Trust Company

Trustees

Dated May 26th, 1932

This trust indenture made the 26th day of May, 1932, between Jack L. Warner, as Grantor, and Albert Warner, Harry M. Warner, Stanleigh P. Friedman and Central Hanover Bank and Trust Company, a corporation organized and existing under the banking laws of the State of New York, as Trustees,

Witnesseth:

The Grantor has herewith deposited with the Trustees and does hereby transfer, assign and convey to the Trustees all his right, title and interest in and to certain life insurance policies on his life described in Schedule A hereto annexed, receipt of which by the Trustees is hereby acknowledged, and which together with any additional life insurance policies or other property which the Grantor or any other person may hereafter deposit with and/or convey to the Trustees subject to the trusts hereby created together with the proceeds thereof, all of

which is hereinafter collectively called the trust estate, shall be held by the Trustees and the survivors or survivor of them and their successors and assigns upon the trusts herein set forth. The Grantor agrees at any time to execute and deliver to the Trustees any further instruments necessary to enable the Trustees to perform the trusts.

1. The Trustees are hereby authorized and directed to collect the proceeds of all policies of insurance which shall have been assigned to or otherwise made payable to the Trustees as and when the same shall become payable to the Trustees; provided, however, that the Trustees shall not be required to institute suit to collect the proceeds of any policy of insurance unless they are in possession of funds sufficient for that purpose or unless they have been indemnified to their satisfaction for the costs, disbursements and all other expenses of any such suit.

2. The Trustees shall hold, manage, invest and from time to time reinvest the trust estate (provided, however, that nothing herein contained shall be construed to prohibit the Trustees from continuing to hold in trust any insurance policies although the same may not be productive of income or may be a wasting asset) and the Trustees shall dispose of the trust estate as follows:

(a) Upon the signing of this Agreement by all parties and the receipt of the policies described in Schedule A hereto annexed, by the Trustees, the Trustees shall set aside policies having a face value of five hundred and fifty thousand dollars (\$550,000)

and shall hold the same as a separate fund subject to the terms and provisions hereof during the life of the Grantor. In case any income shall be received from this trust fund during the life of the Grantor, such income shall as hereinafter provided be applied to the payment of premiums, assessments and other charges on any policies of insurance held in trust under this Agreement, whether forming a part of this particular trust fund or not, and the Trustees shall transfer, assign and pay over any balance of the income not so used or applied to Irma Warner, wife of the Grantor, hereinafter called the Wife, and Jack M. Warner, son of the Grantor, hereinafter called Jack, in the following proportions so long as both are living, that is to say, four-fifths thereof to the Wife and one-fifth thereof to Jack, and all to the survivor of the Wife and Jack in case only one of them shall be living. In case both the Wife and Jack shall die during the Grantor's life, any balance of income not used or applied for the payment of premiums, assessments or other charges on policies of insurance held in trust shall be paid to the issue of Jack who shall be living at the date and/or dates of receipt of such income in equal shares, per stirpes and not per capita; or if no issue of Jack shall be then living to those persons who would, at the date and/or dates of receipt of such income, be entitled to inherit the personal estate of the Grantor under the laws of the State of New York if he had died intestate on the respective date and/or dates of receipt of such income.

Upon the death of the Grantor, the Trustees shall dispose of the principal of this trust fund as follows:

The Trustees shall transfer, assign and pay over from the principal of said fund, the sum of Four Hundred Thousand Dollars (\$400,000) to the Wife if she shall survive the Grantor, or if the Wife shall not survive the Grantor but Jack shall survive the Grantor, the Trustees shall add the said sum of Four Hundred Thousand Dollars (\$400,000) to the principal of the trust estate hereinafter created for Jack's benefit under the provisions of subsection (ii) of subdivision (b) of this Article 2 of this Trust Indenture and shall hold and dispose of the same in accordance with the terms and provisions of said subsection (ii) of said subdivision (b) of this Article 2, or if Jack shall also not survive the Grantor, the Trustees shall transfer, assign and pay over said sum of Four Hundred Thousand Dollars (\$400,000) to the issue of Jack who shall survive the Grantor in equal shares, per stirpes and not per capita; or if no issue of Jack shall survive the Grantor to those persons who would be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if the Grantor had died seized and possessed of the same and intestate.

The Trustees shall upon the death of the Grantor transfer, assign and pay over to Jack from the principal of this trust fund the sum of One Hundred Fifty Thousand Dollars (\$150,000) in case he shall survive the Grantor, or if Jack shall not sur-

vive the Grantor to the issue per stirpes of Jack who shall survive the Grantor, or if no issue of Jack shall survive the Grantor to those persons who would be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if the Grantor had died seized and possessed of the same and intestate.

If both the Wife and Jack shall survive the Grantor and the principal of this trust fund shall be insufficient to pay to both the sums herein directed to be paid to them in full, and any other funds shall be held in trust under any other term or provision of this Agreement, the amount of any such deficiency shall be made up proportionately from the principal of the other funds held in trust at the time of the death of the Grantor to the extent to which they shall be sufficient, and if such additional funds shall prove insufficient or if there shall be no such additional funds held in trust at the time of the Grantor's death, then to the extent to which the funds available for payment shall be insufficient to make payment in full, the amounts herein directed to be paid to the Wife and Jack shall abate proportionately.

If only the Wife or Jack, but not both, shall survive the Grantor, the amount herein directed to be paid to the one who shall so survive shall be paid in full from the principal of this trust fund notwithstanding that there shall not be left sufficient funds to pay to the persons who take in the event of the

death of the one who has died the full amount herein directed to be paid to them, and if the principal of this trust fund shall prove insufficient to make such payment to such survivor and other funds shall be held in trust under any provision hereof, then proportionately from such funds to the extent to which they shall be sufficient.

Nothing herein contained shall be construed to give to any person other than the Wife or Jack any interest in any other funds held under any other provision of this Agreement.

(b) After setting aside policies of insurance of the face amount of five hundred fifty thousand dollars (\$550,000) as hereinbefore provided in subdivision (a), the Trustees shall hold and dispose of the balance of the trust estate as follows:

(i) The Trustees shall set aside such portion of such balance as shall equal at the market value thereof at the time of setting aside the same two-thirds thereof and shall hold the same in trust for the Wife, paying over to her the entire net annual income therefrom in each year during her life, subject, however, to the provisions for the payment of the premiums, assessments and other charges on policies of insurance held in trust out of income as hereinafter provided. Upon the death of the Wife in case Jack shall survive the Wife, the Trustees shall add said two-thirds portion of the balance of the trust estate to the portion of the trust estate held in trust for Jack under the terms and provisions of subsection (ii) of this subdivision

(b) of this Article 2 of this Trust Indenture and shall hold and dispose of the same in accordance with the terms and provisions of said subsection (ii), or if Jack shall not survive the Wife the Trustees shall transfer, assign and pay over said two-thirds portion of the balance of the trust estate to the issue of Jack who shall survive the Wife in equal shares, per stirpes and not per capita; or if no issue of Jack shall survive the Wife to those persons who would be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if the Grantor had died seized and possessed of the same and intestate at the same time as the Wife.

(ii) The Trustees shall set aside the remaining one-third portion of such balance and shall hold the same in trust for Jack, paying over to him the entire net annual income therefrom in each year during his life, subject, however, to the provisions for the payment of premiums, assessments and other charges on policies of insurance held in trust out of income as hereinafter provided, and upon the death of Jack the Trustees shall transfer, assign and pay over the principal of said portion of the trust estate to such persons and upon such estates as Jack shall by his last will and testament duly admitted to probate validly limit and appoint, or to the extent to which Jack shall have failed to make valid testamentary disposition of the whole or any part of said portion of the trust estate, to those persons other than the wife of Jack, who would

be entitled to inherit the same and in the proportions in which they would inherit the same under the laws of the State of New York if Jack had died seized and possessed of the same intestate and without a wife him surviving.

(c) Anything herein contained to the contrary notwithstanding, in case any income shall be received by the Trustees while life insurance policies on which premiums, assessments or other charges are payable are held in trust, such income shall be applied by the Trustees to the payment of such premiums, assessments and other charges on any policy of insurance held in trust to the extent to which it shall be sufficient, and the balance of any income not so applied shall be paid over as herein directed. All dividends, sickness and disability benefits and all other payments which shall be received by the Trustees on account of any insurance policy held in trust which are not in whole or in part in payment or satisfaction of the face amount of such policy, shall be considered income and disposed of as such.

(d) During the minority of any beneficiary, the Trustees may use and apply so much of the net annual income payable to such beneficiary under the provisions hereof for the benefit, support, education, comfort, welfare and maintenance of such minor beneficiary as they may deem advisable, accumulating any balance of income, and upon such beneficiary attaining the age of twenty-one years, the Trustees shall transfer, assign and pay over to

such beneficiary all the income accumulated for his or her benefit.

(e) Anything herein contained to the contrary notwithstanding, in case any share or portion of the trust estate shall vest in the possession of any minor beneficiary, the Trustees shall retain and shall hold, manage, invest and from time to time reinvest the same and shall use and apply so much of the net annual income therefrom for the support, education, benefit, comfort, welfare and maintenance of such beneficiary as they shall deem advisable, accumulating any balance of income not so used or applied, and upon any such beneficiary attaining the age of twenty-one years, the Trustees shall transfer, assign and pay over to such beneficiary the entire principal of his or her share and all accumulations of income thereon; provided, however, that nothing herein contained shall be deemed to postpone the vesting of any such share or portion and in case any such minor beneficiary shall die before attaining the age of twenty-one years, the principal of his or her share or portion together with all accumulations of income thereon shall form a part of his or her estate and shall be disposed of accordingly.

(f) Instead of making personal application of income for the use of any minor beneficiary, the Trustees may transfer, assign and pay over so much of such income as they may deem advisable to either parent or the guardian of the person or property of such minor beneficiary to be by him or her applied to the support, education, comfort, welfare,

benefit and maintenance of such minor beneficiary. The Trustees shall be fully protected in any payments of income so made to such parent or guardian and shall not be responsible for the same but their whole duty and responsibility shall cease upon the making of any such payment.

3. It shall not be lawful for any beneficiary entitled to receive income under any provision hereof to sell, assign, encumber, charge or dispose of by way of anticipation or otherwise, the income payable to any such beneficiary or any part thereof, and notwithstanding any such charge, sale, assignment or other disposition, the Trustees are hereby required to pay such income into the proper hands of such beneficiary for his or her separate and peculiar use and benefit, whether married or single, upon his or her own receipt. Nor shall such income or any part thereof be in any wise liable to any claim of any creditor of any such beneficiary.

4. Subject to the restrictions and limitations herein contained, the Trustees and the survivors or survivor of them and their successors and assigns shall have the following powers, authority and discretion, namely:

To continue to hold upon the trusts hereby created any or all life insurance policies and other property herewith or hereafter conveyed to the Trustees. Nevertheless, in case it shall seem to the individual Trustees advisable so to do, they may direct the Trustees, from time to time, to sell or dispose of all or any part of the same or of any

other property which may at any time constitute the trust estate. The Trustees may invest and from time to time reinvest the proceeds of sale of any of the trust property or any cash held in trust in the public stocks or obligations of the United States of America or of any of the following States thereof, or of any County or City of the following States, namely, New York, New Jersey, Massachusetts, Pennsylvania, Ohio, Illinois, Maine, Rhode Island, Maryland and California, whether or not the same be legal investments for trustees under the laws of the State of New York, and may also, at any time and from time to time, invest such proceeds of sale or any cash held in trust, in such other stocks, bonds, securities, real or personal property as they may deem advisable whether or not the same shall be legal investments for Trustees under the laws of the State of New York, provided however, that no investments shall be made in stocks, bonds, securities or real or personal property other than the Federal, State or Municipal bonds specifically provided above, if after giving effect to such investments, the market value of such other stocks, bonds, securities and real or personal property shall exceed in the aggregate fifty per cent (50%) of the then market value of all the property held in the trust estate, but nothing herein contained shall be construed to require the Trustees to change investments because of any subsequent change in the market value of the securities or property at any time held in trust.

The Trustees may become a party to any reorganization, consolidation, merger or other capital readjustment of any corporation, the stocks or securities of which may at any time be held in trust. They may participate in any such reorganization, consolidation, merger or readjustment to the same extent and as fully as though they were the absolute and individual owners of such stocks or securities, and may deposit with any committee or depositary, pursuant to any plan or agreement of reorganization, consolidation, merger or readjustment, any property held in trust and may make payment from the principal of the trust estate of any charges or assessments imposed by the terms of any plan or agreement of reorganization, consolidation, merger or readjustment, and may receive and continue to hold in trust any property allotted to the trust estate by reason of their participation therein, whether or not the same is an investment of the character hereinabove permitted to the Trustees.

The Trustees may exercise conversion or subscription rights, appurtenant to any stocks, bonds or other securities at any time held in trust, and may use such portion of the principal of the trust estate as may be necessary therefor, whether or not the property resulting from the exercise of any such right will be an investment of the character hereinabove permitted to the Trustees, or in the discretion of the Trustees may sell any such rights. Investments made through the exercise of any such

rights or proceeds received on the sale thereof shall be considered principal.

The Trustees shall not be required to establish any sinking fund to amortize the premium at which any investment or reinvestment may be purchased.

All extraordinary dividends and all realized appreciation in the value of stocks, bonds, securities or other property resulting from the sale or other disposition thereof shall, so far as permitted by law, be considered principal and not income, but ordinary stock dividends paid regularly by a corporation in lieu of or in addition to regular cash dividends shall be considered income and not principal; provided, however, that the Trustees' determination as to whether any dividend should be apportioned or allocated in whole or in part to principal or income shall so far as permitted by law be conclusive and binding upon all persons now or hereafter interested in the trust estate. The Trustees unless otherwise provided herein may pay out of the income received from the trust estate all expenses of the trust and all taxes which may be properly assessed against the trust estate or any beneficiary thereof.

The Trustees may hold the trust estate or any part thereof as an undivided whole without separation as between the trusts hereby created, but no such holding shall defer the vesting of any estate in possession or otherwise according to the terms hereof. The Trustees may compromise, adjust, settle and compound or submit to arbitration on such terms as

may seem advisable to them in their discretion, any claims in favor of the trust estate or against the trust estate.

The Trustees may cause any stocks, securities or property at any time held in trust to be registered in the name of the nominee or nominees of the Trustees or in the name of the Corporate Trustee without disclosure of its trust capacity, or may hold any stocks or securities in bearer form so that they will pass by delivery. Nothing herein contained shall be deemed to relieve the Trustees from liability for the safe custody of any such stocks, securities or other property or from responsibility for the acts of their nominee or nominees.

The Trustees may make distribution of the trust estate in kind or in cash or partly in kind and partly in cash, and the determination of the Trustees as to the fairness and equality of any such distribution shall be conclusive upon all persons entitled to receive any share of the trust estate.

The Trustees shall not be liable for any loss or depreciation in the value of the trust estate occurring by reason of error of judgment in making any sale or investment or reinvestment or in continuing to hold in trust any property herewith or hereafter transferred to the Trustees or any investment or reinvestment hereafter made, unless they shall have failed to act in good faith or with reasonable care.

The Trustees shall not be required to furnish any bond or security for the performance of their duties hereunder.

The Trustees may sell for cash or upon credit and may mortgage or partition upon such terms as they may deem advisable any real estate at any time held in trust. The Trustees may make, execute and deliver leases or renewals of leases for terms not exceeding for any lease or renewal of lease twenty-one years, without making application to the court.

5. Anything herein contained to the contrary notwithstanding, Albert Warner and Harry M. Warner and Stanleigh P. Friedman and Jack M. Warner, son of the Grantor, or any delegate or delegates appointed by any one or more of them pursuant to the provisions hereof, so long as Albert Warner and Harry M. Warner and Stanleigh P. Friedman and Jack M. Warner are all living, shall have the right to jointly and unanimously direct the sale or other disposition by the Trustees of the whole or any part of the insurance policies held in trust or of any other trust property and the investment or reinvestment of any cash in the hands of the Trustees in such of the securities which are hereinabove permitted to the Trustees as they may wish, but no others, and shall also have the right to jointly and unanimously direct the exercise or non-exercise by the Trustees of any right of conversion or subscription and the participation or non-participation or manner of participation by the Trustees in any reorganization, consolidation, merger or other capital readjustment of any corporation, the stocks or securities of which are at any time held in trust, and the Trustees shall have no

power to sell or otherwise dispose of the whole or any part of the insurance policies held in trust or of any other trust property or invest or reinvest any cash in the hands of the Trustees, or take any action with reference to any conversion or subscription right or with reference to any reorganization, consolidation, merger or other capital readjustment of any corporation, the stocks or securities of which are at any time held in trust, except as they are jointly and unanimously directed by Albert Warner and Harry M. Warner and Stanleigh P. Friedman and Jack M. Warner, or any delegate or delegates appointed by any one or more of them pursuant to the provisions hereof, in accordance with the provisions hereof, so long as Albert Warner and Harry M. Warner and Stanleigh P. Friedman and Jack M. Warner are all living; provided, however, anything herein contained to the contrary, that Jack M. Warner shall have no rights, powers, authority or discretion hereunder unless and until he shall have attained full age, and unless and until said Jack M. Warner has attained the age of twenty-one years all rights, powers, authority and discretion given by this Article 5 shall be exercised by Albert Warner, Harry M. Warner and Stanleigh P. Friedman so long as all three are living. In case Albert Warner or Harry M. Warner or Stanleigh P. Friedman or Jack M. Warner shall die, the three survivors of said four persons or the two of said four persons who shall be of full age in case one of said three survivors of said four persons shall be Jack

M. Warner, if and so long as Jack M. Warner shall be under the age of twenty-one years, or any delegate and/or delegates appointed by any one or more of said three survivors or the two of said three survivors who are of full age, in accordance with the provisions hereof, shall have all the rights and powers conferred upon said four persons or the three of them who are of full age, and the delegate or delegates of any one or more of them, so long as they are all living. In case said Stanleigh P. Friedman shall die either before or after the death of the one of the following persons first to die but before the death of the second of the one of the following persons second to die, namely, Albert Warner, Harry M. Warner and Jack M. Warner, said Albert Warner and Harry M. Warner and Jack M. Warner, so long as all three are living, or the two of said three persons who are of full age, in case Jack M. Warner shall not be of full age, and the two survivors of said three persons in case only two of said three persons shall be living if and when both of said two survivors are of full age, shall have the right from time to time by instruments under their hands and seals duly acknowledged in the form required to entitle a conveyance of real property to be recorded in the State of New York and delivered to the Trustees, to jointly and unanimously appoint a substitute in the place and stead of said Stanleigh P. Friedman, and in case any substitute for said Stanleigh P. Friedman so appointed as aforesaid shall die, to from time to time appoint another

substitute for said Stanleigh P. Friedman in the place and stead of any substitute who shall die, and after the death of Albert Warner or Harry M. Warner or Jack M. Warner and said Stanleigh P. Friedman, any substitute for Stanleigh P. Friedman appointed in accordance with the provisions hereof and the two survivors of Albert Warner and Harry M. Warner and Jack M. Warner if and when both of said two survivors shall be of full age, or any delegate and/or delegates appointed by either or both of said two survivors in accordance with the provisions hereof, shall have all the powers, authority and discretion conferred upon Albert Warner and Harry M. Warner and Stanleigh P. Friedman and Jack M. Warner, or the three of them who are of full age, so long as they are all living. In case either Albert Warner or Harry M. Warner or Jack M. Warner shall be deceased and said Stanleigh P. Friedman shall also be deceased, the provisions of this Article 5 shall be inoperative during any period during which there is no substitute for said Stanleigh P. Friedman duly appointed, qualified and acting, and in such event the provisions of this Article 5 shall also be inoperative if and so long as both of the two survivors of Albert Warner, Harry M. Warner and Jack M. Warner are not of full age notwithstanding the fact that there shall be a substitute for said Stanleigh P. Friedman duly appointed, qualified and acting. Said Stanleigh P. Friedman or any substitute for said Stanleigh P. Friedman

appointed in accordance with the provisions hereof may at any time resign by an instrument under his hand and seal duly acknowledged and filed with the Trustees, and in the event of the resignation of said Stanleigh P. Friedman or any substitute for said Stanleigh P. Friedman appointed in accordance with the provisions hereof, or in case said Stanleigh P. Friedman or any substitute for said Stanleigh P. Friedman appointed in accordance with the provisions hereof shall be unable on account of sickness to act hereunder, Albert Warner and Harry M. Warner and Jack M. Warner so long as all three are living and of full age, or the two of said three persons who shall be of full age in case all three shall be living but Jack M. Warner shall be under the age of twenty-one years, or the two survivors of said three persons, if only two of them shall be living, if and when said two survivors are both of full age, shall have the right from time to time to appoint a substitute in the place and stead of said Stanleigh P. Friedman or any substitute for said Stanleigh P. Friedman who shall so resign or be unable on account of sickness to act hereunder, and any such substitute shall have all the powers, authority and discretion of the person in whose place and stead he or she was appointed, provided, however, that in case any substitute shall be appointed to act in the place and stead of said Stanleigh P. Friedman or any substitute for said Stanleigh P. Friedman appointed in accordance with the provisions hereof on account

of the inability of said Stanleigh P. Friedman, or any substitute of said Stanleigh P. Friedman appointed in accordance with the provisions hereof, to act hereunder on account of sickness, the appointment of said substitute shall only continue and be effective so long as said Stanleigh P. Friedman, or any substitute for said Stanleigh P. Friedman named in accordance with the provisions hereof, shall be unable to act on account of sickness, and if such inability shall cease, the appointment of such substitute shall from and after such time be inoperative and of no effect and said Stanleigh P. Friedman, or any substitute for said Stanleigh P. Friedman, who was unable to act on account of sickness shall from and after the time when such liability shall cease have all the rights, powers, authority and discretion that he had prior to the commencement of such inability. The persons having the right to appoint a substitute for said Stanleigh P. Friedman, or any substitute for said Stanleigh P. Friedman, in case of the inability of said Stanleigh P. Friedman, or any substitute for said Stanleigh P. Friedman, to act on account of sickness, shall be the judges as to whether said Stanleigh P. Friedman or any substitute for said Stanleigh P. Friedman appointed in accordance with the provisions hereof is unable on account of sickness to act hereunder, and the Trustees shall be fully protected in relying upon the written statement of said persons that said Stanleigh P. Friedman or any substitute for said Stanleigh P. Fried-

man appointed in accordance with the provisions hereof is unable on account of sickness to act hereunder.

Albert Warner or Harry M. Warner or Stanleigh P. Friedman or Jack M. Warner shall each have the right if and so long as he shall be acting hereunder by an instrument under his hand and seal duly acknowledged and delivered to the Trustee, so long as the provisions of this Article 5 shall continue operative, to at any time and from time to time and for any reason delegate any and all of the powers, authority and discretion given to him by this Article 5 to such person or persons as he may name who may be either one or more of the others of said Albert Warner, Harry M. Warner, Stanleigh P. Friedman and Jack M. Warner, or any other person or persons, and at any time and from time to time by an instrument under his hand and seal duly acknowledged and delivered to the Trustees to revoke any such delegation, provided, however, that any such delegation shall remain in full force and effect unless and until the same is revoked by the person making the delegation in the manner herein set forth, or unless and until the death of the person making the delegation.

In case two of the following persons shall die, namely, Albert Warner, Harry M. Warner and Jack M. Warner, the provisions of this Article 5 shall from and after the happening of such event become inoperative and shall be null and void and of no effect. The Trustees shall be fully protected

in acting upon any direction of the persons who shall from time to time have the right to direct the Trustees under the provisions of this Article 5 and shall not be liable for any depreciation or loss resulting to the trust estate from any action taken or omitted to be taken under the direction of said persons. Neither shall the Trustees be liable for any loss or depreciation resulting to the trust estate by reason of their inability to act because of the provisions of this Article 5.

Nothing in this Article 5 contained shall be construed to prohibit the Trustees from exercising any of the powers, authority and discretion given to the Trustees by any provision of this Trust Indenture, if and so long as the provisions of this Article 5 shall be inoperative for any reason.

6. Albert Warner, Harry M. Warner and Stanleigh P. Friedman shall have the right and power at any time and from time to time during their joint lives by deed or other instrument executed and acknowledged in the form required by law to entitle a conveyance of real property to be recorded to revoke this Trust Indenture or to alter or amend any term or provision thereof in any way or to any extent which may seem to them desirable, except that they shall have no power to diminish the compensation of the Corporate Trustee and in the event of the death of any one or more of the aforesaid three persons, the following two persons in the following order shall be and are hereby nominated and constituted to be the substitutes

to fill any vacancy or vacancies caused either by the death of any one or more of the aforesaid three persons or by the death of either or both of the two following persons, namely, Jack M. Warner, son of the Grantor, and Joseph H. Hazen. In the event, however, that Jack M. Warner shall be called upon to fill any vacancy in pursuance of the order of filling vacancies aforesaid and shall not at that time be of lawful age, then the vacancy which Jack M. Warner would have filled, if of full age, shall be filled by Joseph H. Hazen, if living, instead of by Jack M. Warner, and Jack M. Warner, if and when he shall be of full age, shall fill the next vacancy. If, however, said Joseph H. Hazen shall not be living when such vacancy occurs and Jack M. Warner is not of full age, then Jack M. Warner shall fill such vacancy if and when he attains the age of twenty-one years. If only two of the five persons mentioned in this Article 6, to wit, Albert Warner, Harry M. Warner, Stanleigh P. Friedman, Jack M. Warner and Joseph H. Hazen shall be living, the two survivors of said persons if and/or when both of said two survivors are of full age shall have all the rights, powers, authority and discretion conferred upon Albert Warner, Harry M. Warner, and Stanleigh P. Friedman, so long as all three are living. If more than two of said five persons mentioned in this Article 6 shall be living but only two of said five persons shall be of full age, the said two persons who shall be of full age shall, if and so long as they are the only two of said five

persons who are living and of full age, have all the rights, powers, authority and discretion conferred upon Albert Warner, Harry M. Warner and Stanley P. Friedman so long as all three are living. The provisions of this Article 6 shall be inoperative if and so long as there shall not be two of said five persons herein mentioned living and of full age and the provisions of this Article 6 shall also be inoperative from and after the time when there are less than two of said five persons herein mentioned living. Each and every substitute herein named including the substitute of a substitute shall have all the rights, powers, authority and discretion given by the provisions of this Article 6 to the person in whose place and stead he or she was appointed and if any substitute or substitutes shall qualify hereunder, the provisions of this Article 6 shall be construed as if such substitute or substitutes were originally named herein instead of the person or persons in whose place and stead he, she or they is or are appointed. No person except to the extent herein expressly stated shall have any right, title, interest or estate in or to the trust estate or under any term or provision of this Trust Indenture except subject to the revocation, alteration or amendment of this Trust Indenture and the rights, titles, interests and estates created hereby in accordance with the provisions of this Article 6. Upon the delivery to the Trustees by the persons from time to time having the right to revoke, alter or amend, of said deed or other instrument so signed and

acknowledged by them, this Trust Indenture shall be revoked, altered or amended in the manner or to the extent therein set forth. The term "revocation" as herein used shall include a total or partial revocation. In case this Trust Indenture and the trusts hereby created shall be revoked in whole or in part, the property constituting the trust estate or so much thereof as to which the trust is revoked shall be transferred, assigned and delivered by the Trustees to the Grantor, or to the estate of the Grantor, if he be deceased.

Nothing in this Article 6 contained shall be deemed to confer upon the persons from time to time having the right to revoke, alter or amend under the terms and provisions hereof, the right or power to in any way affect the disposition herein contained or alter the terms and provisions of this Indenture with reference to any property held subject to the provisions of this Indenture which has become vested in the possession of any person and presently payable and distributable by the Trustees under the provisions of this Indenture but which has not in fact been paid and distributed by the Trustees, or with reference to any property held subject to the provisions of this Indenture which has vested in the possession of any person under the provision of this Indenture, the payment of which is postponed by any provision of this Indenture.

7. The Trustees or any one or more of them may at any time resign by mailing to the other Trustees at such time acting and to the beneficiaries

who at the date of such resignation may be entitled to the enjoyment of the income from the trust estate, or to their respective representatives, at their last known post office addresses, respectively, a written notification of such resignation and thereupon shall be entitled to apply to any court having jurisdiction in the premises for the judicial settlement of their accounts as Trustees or Trustee hereunder.

8. This Trust Indenture shall be construed according to the laws of the State of New York where the trust estate is to be administered.

9. In case Stanleigh P. Friedman shall die or resign or for any other reason cease to be a Trustee hereunder, the Grantor and Albert Warner and Harry M. Warner and the survivors or survivor of them shall have the right, by instruments under their hands and seals duly acknowledged in the form required to entitle a conveyance of real property to be recorded in the State of New York and delivered to the Trustees, to from time to time appoint a substitute or successor trustee in the place and stead of said Stanleigh P. Friedman and in case any substitute or successor trustee so nominated or appointed shall die or resign or for any other reason cease to act as trustee hereunder, to from time to time appoint another substitute or successor trustee in the place and stead of any such substitute or successor trustee who shall die or resign or for any other reason cease to act as trustee hereunder. Any substitute or successor trustee so appointed shall in all respects be substituted

in the place and stead of said Stanleigh P. Friedman as a Trustee, and shall have all the rights, powers, authorities, privileges and title herein conferred upon or vested in said Stanleigh P. Friedman as a Trustee.

10. The Grantor and Albert Warner and Harry M. Warner and Stanleigh P. Friedman, and the survivors or survivor of them shall have the right and power, by instrument under their hands and seals duly acknowledged in the form required to entitle a conveyance of real property to be recorded in the State of New York and delivered to the Trustees, at any time to remove the Corporate Trustee, Central Hanover Bank and Trust Company, and to appoint a new Corporate Trustee in the place and stead of the Corporate Trustee herein named, and also from time to time to remove any Successor Corporate Trustee at any time appointed in accordance with any provision of this Article 10 and appoint another Corporate Trustee in the place and stead thereof; provided, however, that any Corporate Trustee appointed in accordance with any provision of this Article 10 shall be a banking corporation authorized to do business in the State of New York and having its principal office and place of business in the Borough of Manhattan and City of New York; provided, further, that no such instrument removing the Corporate Trustee herein named or any other Corporate Trustee appointed pursuant to any provision of this Article 10 shall be effective until another Corporate Trustee authorized to transact business in the State of New York and having its principal office and

place of business in the Borough of Manhattan and City of New York, shall have been appointed in the place and stead thereof, it being the intention of the Grantor that there shall always be a Corporate Trustee acting under the terms and provisions of this Indenture so long as any trust created by this Indenture shall continue in operation. The term "Trustees" as used in this Indenture shall include any Corporate Trustee appointed in accordance with any provisions of this Article 10 and any such Corporate Trustee which shall be appointed shall have all the rights, powers, authorities, privileges and title herein conferred upon the Corporate Trustee, Central Hanover Bank and Trust Company. In case the Corporate Trustee herein named or any Successor Corporate Trustee at any time appointed in accordance with any provision of this Article 10 shall resign or for any other reason cease to act as a Trustee hereunder, the Grantor and Albert Warner and Harry M. Warner and Stanleigh P. Friedman, and the survivors or survivor of them shall have the right and shall be under a duty by an instrument under their hands and seals and duly acknowledged and delivered to the Trustees to appoint another Corporate Trustee in the place and stead of any such Corporate Trustee which has ceased to act as a Trustee hereunder. In case at any time there shall be no Corporate Trustee acting hereunder, and the Grantor and Albert Warner and Harry M. Warner and Stanleigh P. Friedman and the sur-

vivors or survivor of them shall fail within sixty days after there shall fail to be a Corporate Trustee acting hereunder to appoint a new Corporate Trustee, or in case all of said persons shall be deceased, any Court of the State of New York having jurisdiction for the purpose may appoint a new Corporate Trustee hereunder with all the rights, title, interests, powers, authorities and privileges given to the Corporate Trustee herein named.

11. All acts and decisions of the Trustees, as Trustees, shall be unanimous except where powers are herein vested exclusively in individual Trustees or their delegates or substitutes, in which cases they also must act jointly and unanimously, and except as herein otherwise expressly set forth.

12. Whenever in the administration of the trusts hereby created, it shall become necessary for the Trustees to engage legal counsel or employ accountants so long as there shall be individual Trustees or an individual Trustee acting under the provisions hereof, the individual Trustees or individual Trustee who shall be acting at such time, whether or not such individual Trustees or Trustee be named herein or be a successor Trustee appointed in accordance with the provisions hereof, shall have the right to decide what person or persons shall be engaged as legal counsel by the Trustees or engaged as accountants by the Trustees.

13. In the event that the income from the trust estate, so long as the life insurance policies, on which premiums, assessments or other charges are

payable, are held in trust, shall not be sufficient to pay such premiums, assessments or other charges, nothing herein contained shall be construed to require the Trustees to procure funds with which to pay such premiums, assessments or other charges above the amount of income received by them and they shall not be liable for their failure so to do. The Trustees shall not be responsible if for any reason any policy of insurance held in trust shall lapse or be or become otherwise uncollectable.

14. The Trustees shall be the complete and absolute owners of the policies of insurance held in trust and shall have the right to sell or assign any such policy; to borrow money upon any such policy and to hypothecate the same to secure any loan; to receive all dividends on any such policy; to surrender any such policy for cash and to use any such cash surrender value received by them for the purpose of keeping other policies of insurance held by them in force or of adding the proceeds proportionately to the principal of the trust estate or for any other purpose which they may deem advisable; to receive all payments of any kind which may be made during the life of the insured on any policy held in trust; and to exercise any and all other rights, options or privileges which belong to the absolute owner thereof or which are granted by the terms of any such policies or by the terms of this Deed of Trust, except that if and so long as the provisions of Article 5 hereof shall be operative, the Trustees

shall take no action with reference to any insurance policy except as they are directed by the persons having the right to so direct them under the provisions of Article 5 hereof.

In Witness Whereof, Jack L. Warner has hereunto set his hand and seal as Grantor, and Albert Warner and Harry M. Warner and Stanleigh P. Friedman have hereunto set their hands and seals and Central Hanover Bank and Trust Company has caused these presents to be executed and its corporate seal to be hereunto affixed by its officers thereunto duly authorized the day and year above written.

JACK L. WARNER (L.S.)

As Grantor

HARRY M. WARNER (L.S.)

As Trustee

ALBERT WARNER (L.S.)

As Trustee

STANLEIGH P. FRIEDMAN (L.S.)

As Trustee

CENTRAL HANOVER BANK AND
TRUST COMPANY

(Corporate Seal) By B. W. READ,
Asst. Vice President.

Attest:

L. F. RANDOLPH,

Asst. Secy.

[Endorsed]: U. S. B. T. A. Filed at Hearing
Apr. 4, 1940.

[Title of Board and Cause.]

Docket No. 97401. Promulgated October 15, 1940.

1. Gift Tax—Income Payments From Revocable Trust.—Neither the payment of income to petitioner's son and wife from a trust of which a brother of the petitioner was the nominal settlor and over which the petitioner and two others had power to vest the corpus in the petitioner, nor the payment of income to a brother's family from a similar reciprocal trust of which the petitioner was the nominal settlor, constituted a taxable gift from the petitioner, following Estate of Giles W. Mead, 41 B. T. A. 424.

2. Gift Tax—Exclusion—Future Interests.—Edwin Goodwin, 41 B. T. A. 472, followed.

Stanleigh P. Friedman, Esq., and Lawrence A. Baker, Esq., for the petitioner.

B. M. Brodsky, Esq., for the respondent.

OPINION

Murdock: The Commissioner determined the following deficiencies in gift tax:

1932	.....	\$75.14
1933	.....	541.60
1935	.....	3,969.41

The petitioner assigns as error the action of the Commissioner in holding that a gift tax is due from the petitioner on account of income paid in each year to his son and former wife from a trust es-

established by his brother Albert. The Commissioner raises, as an alternative to the correctness of his determination, an affirmative issue that he erred in failing to tax as gifts to the petitioner the income payments made in the taxable years from a trust established by the petitioner. The petitioner claims two exclusions of \$5,000 each in case the respondent's primary contention is sustained, three in case the respondent's alternative contention is sustained, and two others in respect to an "insurance trust." The facts have been stipulated. [53]

Harry, Albert, and Jack L. Warner are brothers. They are the principal executives of Warner Bros. Pictures, Inc. Each has a substantial amount invested in that corporation. The death in 1931 of Lewis Warner, son of Harry, who had been expected to succeed the three brothers in representing the family interests in the corporation, caused the brothers to consider ways and means of insuring the financial security of themselves and their families and of protecting themselves against the exigencies and hazards of the talking picture business, in which the bulk of their fortunes was invested.

They decided to place about \$6,000,000, invested in United States Government obligations, in three trusts. The trusts were to be substantially identical except as to beneficiaries and were to be as safe as possible from acts of the brothers and their families. Stanleigh P. Friedman has been closely associated with the Warners as counsel since 1912. They consulted him and he drew three trust instruments

to secure a "maximum of revocability," to prevent any one brother from invading the corpus, to exclude any "possibility of reverter" to the grantor of the corpus of any trust, to prevent the grantor of a trust from receiving income of that trust, to prevent any one brother from dominating the affairs of the family of a deceased brother, and to minimize and avoid estate taxes. Counsel also suggested that the trusts be created before the gift tax provisions proposed in the 1932 Revenue Bill should become the law. The three trusts were created on May 26, 1932, one by each brother, and each brother transferred to the trust created by him \$2,000,000 face amount of United States Government obligations belonging to him.

The trust created by Albert Warner provided that the income from one-half of the corpus should be paid to the petitioner, the income from one-fourth should be paid to Jack M. Warner, son of the petitioner, and the income from one-fourth should be paid to Irma Warner, then the wife of the petitioner. The income was so paid during the three taxable years. The trustees named were the three Warner brothers, Friedman and a bank. The power to revoke, alter, and amend was vested exclusively in Harry Warner, Friedman, and the petitioner, acting together. The corpus affected by any revocation was to go to the petitioner or his estate. The Commissioner has held that the petitioner was the grantor of that trust, he could revoke it, and the income payments to Irma and Jack M. were gifts from him.

The petitioner created a similar trust on May 26, 1932, under which the income from one-half was payable to the wife and daughters of Harry. The trustees were the same. The power to revoke, alter, and amend was vested in Harry, Albert, and Friedman, and the [54] corpus affected by a revocation was to go to Harry. Harry also created a similar trust on the same day, the chief differences being that the income was payable to Albert and his wife, the power to revoke, alter, and amend was vested in Albert, Friedman, and the petitioner, and the corpus affected by a revocation was to go to Albert.

It does not appear that any one of the Warners would have created a trust for the benefit of his brother's family had not the other two agreed at the same time to create similar trusts but, on the contrary, the creation of each was dependent upon and in consideration of the creation of the other two.

The Commissioner has determined the deficiencies upon the theory that the petitioner was the settlor of the trust which made the payments to his son and his former wife; he and two persons without adverse interests could revoke the trust; the trust was an incomplete gift; and the payment of the income to the son and former wife constituted a gift taxable to the petitioner. The Commissioner still advances that theory as his primary contention. He argues that the petitioner was the real, though not the nominal, grantor of the trust benefiting the petitioner and his family as a result of the recipi-

cality of the almost identical trusts. The case of *Allan S. Lehman, et al., Executors*, 39 B. T. A. 17; *affd.*, 109 Fed. (2d) 99; *certiorari denied* U. S. (5/20/40) holds, under similar circumstances, that one who by paying a *quid pro quo* has caused another to create a trust for his benefit may properly be regarded as the settlor. The Commissioner continues with the argument that the petitioner, the settlor, has retained for himself, in conjunction with two others without adverse interests, the power to alter, amend, or revoke the trust. Therefore, concludes the Commissioner, the income, which the petitioner had the power to withhold, was a gift as it was paid to the wife and son during the taxable years.

He also makes an alternative argument, solely for protection and quite subordinate to the one just described. It is that the payments of income from the trust created by the petitioner for the benefit of Harry's family are taxable gifts from the petitioner, since the reservation of powers in others to alter, amend, or revoke left the gift to the beneficiaries incomplete until income was actually paid to them.¹

An absolutely essential premise in each of these

¹It would appear that the payment of this income could not be a taxable gift from the petitioner under any circumstances, since he had parted absolutely with the property and had retained no power to revest title in himself. Cf. section 501 (c) of the Revenue Act of 1932, repealed as unnecessary by section 511 of the Revenue Act of 1934.

contentions of the Commissioner is that current income from a revocable trust [55] constitutes a taxable gift at the time it is paid to the beneficiaries. The Board has held directly to the contrary in *Estate of Giles W. Mead*, 41 B. T. A. 424, after considering the same arguments which the Commissioner makes here to support his premise. The Board disagrees with the present argument of the Commissioner that the *Mead* case was incorrectly decided. He next attempts to distinguish the present case from the *Mead* case on the ground that there the income of the trust was not taxable to the settlor, whereas here it would be. We need not decide whether the factual difference exists, because it would not distinguish the cases in any event. The income tax question was mentioned in the *Mead* opinion, but that opinion was not made to depend upon whether or not the income of the trust was taxable to the grantor. The cases are not distinguishable upon the ground suggested by the Commissioner or upon any other ground that has come to our attention. It follows that the payment of the income of the trusts was not the occasion of a taxable gift and neither argument of the Commissioner supports his determination of deficiencies.

The only question remaining for decision is whether the petitioner is entitled to annual exclusions up to \$5,000 for each beneficiary in computing his annual gifts to an insurance trust resulting from his payment of the annual premiums. The petitioner had irrevocably assigned to the trust

certain policies of life insurance upon his own life. The trustees were to collect the proceeds upon his death, invest them, and pay the income from the investments to the son and to the then wife of the petitioner, with remainders over. The interest of the wife was eliminated on March 19, 1935, and the son remained as the sole life beneficiary. The payment of the premiums did not constitute gifts of future interests and, consequently, the exclusions are allowed under section 504 (b) of the Revenue Act of 1932. *Edwin Goodman*, 41 B. T. A. 472; *Welch v. Davidson*, 102 F. (2d) 100. A separate exclusion is allowed for each beneficiary. *Wilton Rubinstein*, 41 B. T. A. 220. *Contra*, *U. S. v. Ryerson*, Fed. (2d) (7/9/40).

Reviewed by the Board.

Decision will be entered under Rule 50.

Opper, dissenting: Revenue Act of 1932, section 501 (c) provides:

The [gift] tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, * * * but * * * any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift. [56]

Although this section was repealed by Revenue Act of 1934, section 511, that action was not retroactive and can have no effect on two of the years, 1932 and 1933, which are before us here. Of greater and

seemingly controlling significance is the reason given for the repeal, which was:¹ "Since the principle expressed in that section is now a fundamental part of the law by virtue of the Supreme Court's decision in the Guggenheim Case."² In that case Mr. Justice Cardozo made it clear that where the power to revoke is retained no completed gift of principal or future income results. "As to the principal of the trusts and as to income to accrue thereafter the gifts were formal and unreal." The opinion goes on to say that in making "deeds of gift after the Act of 1924" taxpayers "had the assurance of a Treasury regulation that the tax would not be laid, where the power of revocation was uncanceled, *except upon the income paid from year to year.*" (Emphasis added.) If this statement of existing law was the reason for the repeal of section 501 (c), that action is no reason for failure to apply the gift tax to "the income paid from year to year."

And since it was the payment of income "which was taxed as a transfer and not the transfer in trust, the statute was not retroactively applied"³ so as to contravene the prospective emphasis furnished by section 501 (b).

I respectfully dissent.

Disney and Harron agree with this dissent. [57]

¹H. Rept. No. 704, 73d Cong., 2d sess., p. 40, Sen. Rept. No. 558, 73d Cong., 2d sess., p. 50. And see *Estate of Sanford v. Commissioner*, 308 U. S. 39, 45.

²*Burnet v. Guggenheim*, 288 U. S. 280.

³*Estate of Sanford v. Commissioner*, *supra*, p. 43.

United States Board of Tax Appeals

Docket No. 97401.

JACK L. WARNER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

The respondent on December 6, 1940 filed a proposed computation, pursuant to the Board's Opinion promulgated October 15, 1940. The petitioner agrees with said computation and has noted his acquiescence thereon. Therefore, it is

Ordered and decided, that there is no deficiency in gift tax for the years 1932 and 1933, and that there is an overpayment in gift tax for the year 1935 in the amount of \$42.49 which is barred by the statute of limitations.

(Signed) J. E. MURDOCK

Member.

Enter: Entered December 13, 1940. [58]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

PETITION FOR REVIEW

Guy T. Helvering, United States Commissioner of Internal Revenue, hereinafter referred to as the Commissioner, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Ninth Circuit to review the decision entered by the United States Board of Tax Appeals on December 13, 1940, ordering and deciding that there are no deficiencies in gift tax due from Jack L. Warner, respondent on review, for the years 1932 and 1933, and an overpayment in gift tax for the year 1935 in the amount of \$42.49. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

Jack L. Warner, the respondent on review, hereinafter referred to as the taxpayer, filed his gift tax returns for the years 1932, 1933 and 1935 with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, whose office is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit. [59]

Nature of Controversy

The nature of the controversy is as follows, to-wit:

Harry, Albert and Jack L. Warner, the taxpayer, are brothers. They are the principal executives of

Warner Brothers Pictures, Inc. Each had a substantial amount invested in that corporation. For the purpose of insuring the financial security of themselves and their families and of protecting themselves against the exigencies and hazards of the talking picture business, in which the bulk of their fortunes was invested, they decided to place \$6,000,000 invested in United States Government obligations in three trusts. The three trusts were created on May 26, 1932, one by each brother, and each transferred to his respective trust \$2,000,000 face amount of United States Government obligations. The trusts are substantially identical except as to the beneficiaries. The beneficiaries of Albert Warner's trust were taxpayer and his family; the beneficiaries of taxpayer's trust were Harry Warner and his family, and the beneficiaries of Harry Warner's trust were Albert and his family. In each trust, the two brothers of the grantor, Stanleigh P. Friedman, and the Central Hanover Bank & Trust Company of New York, were named as trustees. The individual trustees, acting together had the power to revoke, alter or amend the trust. Upon revocation the trusts were so arranged that the corpus of Albert Warner's trust would go to taxpayer; the corpus of taxpayer's trust would go to Harry Warner, and the corpus of Harry Warner's trust would go to Albert Warner. [60]

The Commissioner determined deficiencies in gift tax due from taxpayer for the years 1932, 1933 and 1935 in the respective amounts of \$75.14, \$541.60 and \$3,969.41 upon the grounds that (1)

taxpayer was the real, as distinguished from the nominal, settlor of the trust which made the payments to his son Jack M. Warner and his former wife; (2) taxpayer and two persons without adverse interest could revoke the trust; (3) the trust was an incomplete gift; and (4) the payments of the income to the son and former wife constitute gifts taxable to the taxpayer.

In the alternative that the payments made from the trust created by the taxpayer to Harry Warner and his family were taxable gifts, since the reservation of powers in others, without adverse interest, to alter, revoke, or amend the trust, left the gift to the beneficiaries incomplete until income was actually paid to them.

The taxpayer petitioned for a redetermination of the gift tax deficiencies for the years 1932, 1933 and 1935, by the Board of Tax Appeals, asserting that the Commissioner had erred in determining that the amounts paid during said years from trust income to taxpayer's son and wife, the beneficiaries named in the Albert Warner trust, were taxable as gifts made by taxpayer. The Commissioner in his answer denied the allegation of error.

By amended petition filed with the Board of Tax Appeals April 15, 1940, the taxpayer alleged that the Commissioner [61] had failed to allow the proper number of statutory exclusions in computing the net gifts to a certain insurance trust, created by the taxpayer, due to his payment of annual premiums on certain life insurance policies on his life

transferred to said trust. The Commissioner filed his answer to the amended petition, April 23, 1940, denying the alleged error and averred affirmatively that he had erred in allowing two statutory exclusions aggregating \$10,000, in his notice of deficiency for the years 1932, 1933 and 1935, and that taxpayer was entitled to only one exclusion of \$5,000 with respect to the gifts made from trust income, under either the "primary" or "alternative" theories in computing the annual gifts made under the trust indenture dated May 26, 1932.

The Board of Tax Appeals concluded that (1) neither the payment of income to taxpayer's son and wife from a trust, of which taxpayer's brother Albert Warner was the nominal settlor and over which the taxpayer and two others had power to vest the corpus in taxpayer nor the payment of income by taxpayer to his brother's family from a similar reciprocal trust of which the taxpayer was the nominal settlor, constituted a taxable gift from the taxpayer during the years 1932, 1933 and 1935, and (2) the payment of the premiums on policies of life insurance did not constitute gifts of future interests and the number of exclusions is governed by the number of beneficiaries under the trust. [62]

ASSIGNMENTS OF ERROR

The Commissioner assigns the following errors:

The Board of Tax Appeals erred:

1. In holding and deciding that the payments made from the trust established by Albert Warner

to the son and wife of the taxpayer during the years 1932, 1933 and 1935, were not taxable in the year of their receipt as gifts made by the taxpayer.

2. In holding and deciding that the payments made to Harry Warner, his wife, and daughters during the years 1932, 1933 and 1935 from the trust established by the taxpayer, did not constitute taxable gifts from the taxpayer to his brother's family.

3. In failing to hold and decide that the taxpayer was the real grantor of the trust created by Albert Warner for the benefit of taxpayer and his family as a result of the reciprocal nature of the almost identical trusts created by each of the three brothers.

4. In failing to hold and decide that the payments of income during the years 1932, 1933 and 1935 to the wife and two daughters of Harry Warner, pursuant to the terms of the reciprocal trust created by the respondent on review May 26, 1932, operated to free the disposition of such income from the donor's control and therefore render the payments completed gifts within the meaning of the Federal Gift Tax statutes.

5. In holding that where gifts are made to a trust, the number of exclusions is governed by the number of beneficiaries under the trust. [63]

6. In failing to hold and decide that taxpayer was not entitled to the allowance of any exclusion with reference to gifts made for the insurance trust, in that all of the gifts made to the insurance trust were gifts of future interests as to which Section

504(b) of the Revenue Act of 1932 permits no exclusion.

7. In entering its final order of redetermination that there are no deficiencies in gift tax for the years 1932 and 1933, and an overpayment in gift tax for the year 1935, in the amount of \$42.49.

8. In failing to enter a final order of redetermination that there are due from the respondent on review deficiencies in gift tax for the years 1932, 1933 and 1935 in the respective amounts of \$75.14, \$541.60 and \$3,969.41.

9. In that its decision is not supported by the evidence.

10. In that its decision is contrary to law and regulations.

(s) SAMUEL O. CLARK, JR.

Assistant Attorney General

(Signed) J. P. WENCHEL

RLW

Chief Counsel,

Bureau of Internal Revenue

Of Counsel:

JOHN W. SMITH,

Special Attorney,

Bureau of Internal Revenue.

JWS:GEB

[Endorsed]: U. S. B. T .A. Filed Mar. 6, 1941.

[64]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Jack L. Warner,
1801 Angelo Drive,
Beverly Hills, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 6th day of March, 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 6th day of March, 1941.

(Signed) J. P. WENCHEL

RLW

Chief Counsel,

Bureau of Internal Revenue

Personal service of the foregoing notice, together with a copy of the petition for review mentioned therein,, is hereby acknowledged this 13th day of March, 1941.

(s) JACK L. WARNER

Respondent on Review

[Endorsed]: U. S. B. T. A. Filed March 19, 1941.

[65]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Stanleigh P. Friedman,
11 West 42nd Street,
New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 6th day of March, 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 6th day of March, 1941.

(Signed) J. P. WENCHEL,

RLW

Chief Counsel,

Bureau of Internal Revenue

Personal service of the foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 7th day of March, 1941.

(s) STANLEIGH P. FRIEDMAN
Counsel for Respondent on Review

[Endorsed]: U. S. B. T. A. Filed Mar. 19, 1941.

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

STATEMENT OF POINTS

Now comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby asserts the following errors on which he intends to rely in this review:

1. The Board erred in holding and deciding that the payments made from the trust established by Albert Warner to the son and wife of the taxpayer during the years 1932, 1933 and 1935, were not taxable in the year of their receipt as gifts made by the taxpayer.

2. The Board erred in holding and deciding that the payments made to Harry Warner, his wife, and daughters during the years 1932, 1933, and 1935 from the trust established by the taxpayer, did not constitute taxable gifts from the taxpayer to his brother's family.

3. The Board erred in failing to hold and decide that the taxpayer was the real grantor of the trust created by Albert Warner for the benefit of taxpayer and his family as a result of the reciprocal nature of the almost identical trusts created by each of the three brothers.

4. The Board erred in failing to hold and decide that the payments of income during the years

1932, 1933 and 1935 to the wife and two [67] daughters of Harry Warner, pursuant to the terms of the reciprocal trust created by the respondent on review May 26, 1932, operated to free the disposition of such income from the donor's control and therefore render the payment completed gifts within the meaning of the Federal Gift Tax statutes.

5. The Board erred in holding that where gifts are made to a trust, the number of exclusions is governed by the number of beneficiaries under the trust.

6. The Board erred in failing to hold and decide that taxpayer was not entitled to the allowance of any exclusion with reference to gifts made for the insurance trust, in that all of the gifts made to the insurance trust were gifts of future interests as to which Section 504(b) of the Revenue Act of 1932 permits no exclusion.

7. The Board erred in entering its final order of redetermination that there are no deficiencies in gift tax for the years 1932 and 1933, and an overpayment in gift tax for the year 1935, in the amount of \$42.49.

8. The Board erred in failing to enter a final order of redetermination that there are due from the respondent on review deficiencies in gift tax for the years 1932, 1933 and 1935 in the respective amounts of \$75.14, \$541.60 and \$3,969.41.

9. The Board erred in that its decision is not supported by the evidence. [68]

10. The Board erred in that its decision is contrary to law and regulations.

(Signed) J. P. WENCHEL

RLW

Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within statement of points is hereby admitted this 14th day of August, 1941.

STANLEIGH P. FRIEDMAN
LAWRENCE A. BAKER

Counsel for Respondent on Review.

JWS:br 8-1-41

[Endorsed]: U. S. B. T. A. Filed Sept. 3, 1941.
[69]

In the United States Circuit Court of
Appeals for the Ninth Circuit

[Title of Cause.]

ORDER

Upon consideration of the motion filed herein by petitioner on review, and good cause appearing to the Court for the granting of such motion, it is by the Court ordered:

That the motion is granted as made and that the time for the preparation and transmission to the Clerk of this Court of the record sur petition for review filed in the above-entitled proceeding be and it

is hereby extended to and including June 16, 1941.

It is further ordered that the Clerk of this Court be directed to transmit to the Clerk of the Board of Tax Appeals a certified copy of this order to be by him incorporated in the record on review as certified and transmitted by him to this Court.

By the Court,

FRANCIS A. GARRECHT

Judge, U. S. Circuit Court of
Appeals.

(Endorsed): Order Filed April 11, 1941, Paul
P. O'Brien, Clerk.

A true copy:

Attest: April 11, 1941

(Seal) (Signed) PAUL P. O'BRIEN

Clerk.

JWS:br.4/3/41

[Endorsed]: U. S. B. T. A. Filed Apr. 16, 1941.

[70]

In the United States Circuit Court of
Appeals for the Ninth Circuit

[Title of Cause.]

ORDER

Upon consideration of the motion filed herein by petitioner on review, and good cause appearing to the Court for the granting of such motion, it is by the Court ordered;

That the motion is granted as made and that the time for the preparation and transmission to the

Clerk of this Court of the record sur petition for review filed in the above-entitled proceeding be and it is hereby extended to and including August 15, 1941.

It is further ordered that the Clerk of this Court be directed to transmit to the Clerk of the Board of Tax Appeals a certified copy of this order to be by him incorporated in the record on review as certified and transmitted by him to this Court.

By the Court,

CURTIS D. WILBUR

Judge, U. S. Circuit Court of
Appeals.

(Endorsed): Filed June 7, 1941. Paul P. O'Brien,
Clerk.

A true copy:

Attest: June 7, 1941

(Seal) (Signed) PAUL P. O'BRIEN,
Clerk.

[Endorsed]: U. S. B. T. A. Filed June 11, 1941.

[71]

In the United States Circuit Court of
Appeals for the Ninth Circuit

[Title of Cause.]

ORDER

Upon consideration of the motion filed herein by petitioner on review, and good cause appearing to

the Court for the granting of such motion, it is by the Court ordered:

That the motion is granted as made and that the time for the preparation and transmission to the Clerk of this Court of the record sur petition for review filed in the above-entitled proceeding be and it is hereby extended to and including September 15, 1941.

It is further ordered that the Clerk of this Court be directed to transmit to the Clerk of the Board of Tax Appeals a certified copy of this order to be by him incorporated in the record on review as certified and transmitted by him to this Court.

By the Court,

Judge, U. S. Circuit Court of
Appeals.

JWS:br. 8-1-41

(Endorsed): Filed August 6, 1941, Paul P. O'Brien, Clerk.

A true copy.

Attest: August 6, 1941

(Seal) Signed PAUL P. O'BRIEN
Clerk.

[Endorsed]: U. S. B. T. A. Filed Aug. 11, 1941.

[72]

In the United States Circuit Court of
Appeals for the Ninth Circuit

[Title of Cause.]

DESIGNATION OF PORTIONS OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN THE PRINTED RECORD
ON REVIEW.

To the Clerk of the United States Board of Tax
Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above-entitled proceeding in connection with the petition for review by the Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of all proceedings before the Board.

2. Pleadings before the Board:

(a) Petition, including annexed copy of deficiency letter dated December 21, 1938, and Bureau letter dated August 4, 1938.

(b) Answer filed April 19, 1939.

(c) Amended Answer filed April 4, 1940.

(d) Reply to Amended Answer filed April 4, 1940.

(e) Amendment to petition filed April 15, 1940.

(f) Answer to amendment to petition filed April 23, 1940. [73]

(g) Reply to answer to amendment to petition filed April 30, 1940.

3. Stipulation of facts omitting Exhibits A to G, inclusive, these exhibits to be transmitted separately in accordance with order of Court. (See Item 6 hereof).

4. Opinion and Decision of the Board.

5. Petition for Review, together with proof of service of notice of filing and of service of a copy of petition for review.

6. Order of Court directing the Clerk of the Board of Tax Appeals to separately transmit Exhibits A, B, C, D, E, F and G, referred to in the Stipulation of Facts. (See Item 3 hereof.)

Not of record.

7. Statement of Points to be relied upon by petitioner on review.

8. Orders enlarging time for transmission of the certified typewritten record on review.

9. This Designation of Portions of Record to be contained in the printed record on review.

Said transcript is to be prepared, certified, and transmitted, as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

(Signed)

J. P. WENCHEL

RLW

Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within designation is hereby admitted this 14th day of August, 1941.

Agreed to:

STANLEIGH P. FRIEDMAN
LAWRENCE A. BAKER

Counsel for Respondent on Review.

JWS:br 8-1-41

[Endorsed]: U. S. B. T. A. Filed Sept. 3, 1941.

[74]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 74, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 5 day of Sept. 1941.

(Seal)

B. D. GAMBLE

Clerk, United States Board of
Tax Appeals.

[Endorsed]: No. 9909. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Jack L. Warner, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed September 11, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of
Appeals for the Ninth Circuit

U. S. C. C. A. No. 9909

B. T. A. Docket No. 97401

GUY T. HELVERING,

Commissioner of Internal Revenue,

Petitioner on Review,

v.

JACK L. WARNER,

Respondent on Review.

AMENDMENT TO DESIGNATION OF RECORD
FILED WITH THE U. S. BOARD OF
TAX APPEALS, SEPTEMBER 3, 1941.

To the Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit:

Item 3 of the designation filed with the Board

under date of September 3, 1941, is amended to read as follows:

Stipulation of Facts including Exhibits A to G, inclusive.

Item 6 of the designation of September 3, 1941, is eliminated.

J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue. Counsel for Petitioner on Review.

Service of the copy of within amendment to designation is hereby admitted this 19th day of September, 1941.

Agreed to:

STANLEIGH P. FRIEDMAN

LAWRENCE A. BAKER

Counsel for Respondent on Review.

[Endorsed]: Filed Sep 25, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S DESIGNATION OF THE
PARTS OF THE RECORD TO BE
PRINTED

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by his at-

torneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, pursuant to his petition for review of the decision of the United States Board of Tax Appeals entered December 13, 1940, designates the parts of the record considered material to the questions on review to be included in the printed transcript of the record, as follows:

1. Docket entries of all proceedings before the Board.

2. Pleadings before the Board:

- (a) Petition, including annexed copy of deficiency letter dated December 21, 1938, and Bureau letter dated August 4, 1938.

- (b) Answer filed April 19, 1939.

- (c) Amended Answer filed April 4, 1940.

- (d) Reply to Amended Answer filed April 4, 1940.

- (e) Amendment to petition filed April 15, 1940.

- (f) Answer to amendment to petition filed April 23, 1940.

- (g) Reply to answer to amendment to petition filed April 30, 1940.

3. Stipulation of facts including pages 1 to 28, inclusive, of Exhibit "A" and pages 1 to 20, inclusive, of Exhibit "G", the remaining pages of said Exhibits and Exhibits B, C, D, E and F being omitted from the printed transcript of record.

4. Opinion and Decision of the Board.

5. Petition for Review, together with proof

of service of notice of filing and of service of a copy of petition for review.

6. Statement of Points to be relied upon by petitioner on review.

7. Orders enlarging time for transmission of the certified typewritten record on review.

8. Designation of Portions of Record, proceedings and evidence to be contained in the printed record on review.

9. Amendment to designation of record filed with the United States Board of Tax Appeals, September 3, 1941.

SAMUEL O. CLARK, Jr.

W.O.R

Assistant Attorney General.

J. P. WENCHEL

C. A. S.

Chief Counsel, Bureau of
Internal Revenue. Coun-
sel for Petitioner on Re-
view.

Service of a copy of the designation of the parts of the record to be printed is hereby admitted this 19th day of September, 1941.

Agreed to:

STANLEIGH P. FRIEDMAN

LAWRENCE A. BAKER

Attorneys for Respondent on
Review.

[Endorsed]: Filed Sept. 25, 1941. Paul P.
O'Brien, Clerk.

No. 9909

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JACK L. WARNER, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

J. LOUIS MONARCH,
GERALD L. WALLACE,
WILLIAM L. CARY,

Special Assistants to the Attorney General.

FILED

DEC 8 1911

PAID RETURN

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9909

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JACK L. WARNER, RESPONDENT

*ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS*

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Board of Tax Appeals (R. 112-119) is reported at 42 B. T. A. 954.

JURISDICTION

This appeal involves gift taxes for the years 1932, 1933 and 1935 and is taken from a decision of the Board of Tax Appeals entered December 13, 1940. (R. 120.) The case is brought to this Court by petition for review filed March 6, 1941 (R. 121-126) pursuant to the provisions of Sections 1141-1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Taxpayer and his two brothers created reciprocal trusts, each dependent upon the other, and each cre-

ated in consideration of the other two. One trust was created by one brother for the benefit of taxpayer and his family, with provisions permitting the taxpayer, jointly with his attorney and the third brother, to revoke the trust and pay the proceeds to himself. The question is whether the distribution of the income from this trust to members of the taxpayer's family constituted a taxable gift by him in the year of payment.

2. The taxpayer transferred life insurance policies to a trust to hold until his death. The trustees were then to collect the proceeds and distribute *part of the principal and the income from the balance* to his wife and son, if living, and otherwise to specified remaindermen. The question is whether the payment of premiums constituted gifts of future interests under Section 504 (b) of the Revenue Act of 1932.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved herein are set forth in the Appendix, *infra*, pp. 35-37.

STATEMENT

The material facts, taken from the findings of the Board of Tax Appeals (R. 112-119) and from the exhibits contained in the record (R. 51-111), are as follows:

I

The taxpayer, Jack L. Warner, and Harry and Albert Warner, are brothers. They are the principal executives of Warner Brothers Pictures, Incorporated. The death of Harry's son in 1931, who had been expected to succeed the three brothers in repre-

senting the family interests in the corporation, caused the brothers to consider ways of insuring the financial security of themselves and their family. They decided to place about \$6,000,000 invested in United States Government obligations in three trusts, and therefore consulted Stanleigh P. Friedman, who had been closely associated with them as counsel since 1912. (R. 13.) Friedman drew three trust instruments with the stated purposes (R. 114)—

to secure a "maximum of revocability," to prevent any one brother from invading the corpus, to exclude any "possibility of reverter" to the grantor of the corpus of any trust, to prevent the grantor of a trust from receiving income of that trust, to prevent any one brother from dominating the affairs of the family of a deceased brother, and to minimize and avoid estate taxes. * * *

Counsel also suggested that the trusts be created before the gift tax provisions proposed in the 1932 Revenue Bill should become the law.

The three trusts were created on May 26, 1932, one by each brother, and each one transferred to the trust created by him \$2,000,000 face amount of United States Government obligations. The trusts were to be substantially identical except as to beneficiaries. The trust created by Albert Warner provided that the income from one-half the corpus should be paid to the taxpayer, the income from one-fourth should be paid to Jack M. Warner, taxpayer's son, and the income from the other fourth should be paid to taxpayer's wife. It was so paid during the three taxable years here in-

volved. The trustees named were the three Warner brothers, Friedman and a bank. The power to revoke, alter and amend was vested exclusively in Harry Warner, Friedman and the taxpayer acting together, while the latter was alive, and the corpus upon revocation was to go to the taxpayer or his estate. (R. 114.)

For comparison, significant provisions of the three trusts set side by side may be summarized as follows (Ex. A, R. 51-81; Exs. C and D (see R. 33)):

Nominal Grantor	Albert Warner	Taxpayer	Harry Warner
1. Beneficiaries.....	Taxpayer and his family	Harry Warner and his family.	Albert Warner and his family.
2. Persons having the joint power to revoke.	Taxpayer, Harry Warner and Friedman.	Albert and Harry Warner and Friedman.	Taxpayer, Albert Warner and Friedman.
3. Trustees.....	Taxpayer, Harry Warner, Friedman, and Central Hanover Bank.	Albert and Harry Warner, Friedman and Central Hanover Bank.	Taxpayer, Albert Warner, Friedman and Central Hanover Bank.
4. Recipient of corpus in event of revocation.	Taxpayer or his estate...	Harry Warner or his estate.	Albert Warner or his estate.

The Board of Tax Appeals has found as a fact that (R. 115):

It does not appear that any one of the Warners would have created a trust for the benefit of his brother's family had not the other two agreed at the same time to create similar trusts but, on the contrary, the creation of each was dependent upon and in consideration of the creation of the other two.

The Commissioner determined the deficiency against the taxpayer upon the theory that taxpayer was the settlor of the trust which made the payments to his

son and his former wife; that he and two persons without adverse interests could revoke the trusts; and that the trust was an incomplete gift and the payment of the income to the son and the wife constituted a gift taxable to the taxpayer. The taxpayer brought an action for redetermination of the deficiencies determined by the Commissioner (R. 4-20) and the Board of Tax Appeals found in his favor (R. 120). The Commissioner has appealed from the Board's decision. (R. 121-126.)

II

On May 26, 1935, taxpayer created an insurance trust (Ex. G, R. 81-111) with Albert Warner, Harry M. Warner, Friedman and the Central Hanover Bank as trustees, and deposited in it certain insurance policies on his life. The indenture provided that the trustees should set aside policies having a face value of \$550,000 and hold them as a separate fund during his life; further that in case any income should be received from this trust fund during the period it should be applied to the payment of premiums, assessments and other charges upon any policies of insurance held in trust and the trustees should pay over any balance of income to Irma Warner, grantor's wife, and Jack M. Warner, his son, with remainders over in the event of their previous death. (R. 82-83.) Upon the death of the grantor, it was provided that the trustees should dispose of the principal of the trust fund as follows: (a) \$400,000 to the taxpayer's wife if she should survive him, or if the wife should not survive the grantor but Jack should, then the trus-

tees were to add the money to the principal of the trust fund created for Jack's benefit. Finally, if Jack should not survive the grantor, the trustees were to distribute the proceeds to specified classes of remaindermen. (b) \$150,000 from the principal to his son Jack, or if Jack should not survive the grantor, to specified classes of remaindermen. (R. 84-85.)

In his gift tax returns for the years 1932, 1933 and 1935, the taxpayer included as taxable gifts the amount which he paid as premiums on the life insurance policies which constituted the corpus of the insurance trust and no question has been raised here as to the inclusion. (R. 46.) However, in his gift tax returns, the taxpayer claimed exclusions in the amount of \$5,000 for each beneficiary upon the ground that the gifts made were gifts of present interests. These exclusions were disallowed by the Commissioner, who made the following statement (R. 48-49):

Two exclusions in the amount of \$10,000, claimed with respect to the premiums paid on the life insurance policies placed in trust under the trust indenture dated May 26, 1932, are disallowed. As it appears that no payments will be made to the beneficiaries of the trust until your death, the gifts are considered to be gifts of future interests, against which no exclusions are allowable.

* * * * *

Taxpayer filed his petition for redetermination before the Board of Tax Appeals, which decided that the payment of premiums did not constitute gifts of future interests and consequently that the exclusions

should be allowed under Section 504 (b) of the Revenue Act of 1932. (R. 118.) From this decision, the Commissioner has appealed. (R. 121-126.)

STATEMENT OF POINTS TO BE URGED

The statement of points, all of which are here relied upon, are set forth in full on pages 129-131 of the record. They may be roughly summarized as follows:

1. The Board of Tax Appeals erred in holding and deciding that the payments made from the trust established by Albert Warner to the son and wife of the taxpayer during the years 1932, 1933 and 1935, were not taxable in the year of their receipt as gifts made by the taxpayer.

2. The Board erred in failing to hold and decide that taxpayer was not entitled to the allowance of any exclusion with reference to gifts made for the insurance trust, in that all of the gifts made to the insurance trust were gifts of future interests as to which Section 504 (b) of the Revenue Act of 1932 permits no exclusion.

SUMMARY OF ARGUMENT

I

Our principal contention here focuses upon the trust created by Albert Warner under which the taxpayer, his wife and son were the beneficiaries and taxpayer was the recipient of the corpus in the event of revocation. Taxpayer, together with the third brother, Harry Warner, and his counsel, Stanleigh Friedman, had the joint power to revoke at any time. We submit

✓ that under the circumstances of this case taxpayer is the real grantor of the trust created by his brother, Albert Warner; further, that because he has retained the power to revoke, along with two other persons having no substantial adverse interest, he is subject to gift tax with respect to the income from the trust distributed to members of his family.

It is true that taxpayer was not the nominal grantor of the trust created by Albert Warner. However, the facts are that almost simultaneously he and his two brothers created trusts containing two million dollars each and substantially identical in form except as to the beneficiaries and the recipients of the corpus on revocation. By establishing reciprocal trusts, each of them succeeded in having a trust precisely identical with the one which he would have created for himself and family, but instead of establishing it directly it was arranged that the trust created by one brother should be for the benefit of the other two. The Board of Tax Appeals has found that the creation of each trust was dependent upon and in consideration of the other two. Under these circumstances, we submit that taxpayer must not be permitted both to keep his cake and eat it; the trust created by Albert Warner was clearly taxpayer's trust in every respect except for a pure formality.

Assuming that taxpayer is the real grantor of the Albert Warner trust, it is clear that he is subject to the gift tax upon the payment of income made to members of his family. We submit that this question is settled conclusively by literal interpretation of Sec-

tion 501 (c) of the Revenue Act of 1932. Furthermore, there are numerous analogous situations which compel the conclusion that taxpayer is subject to a gift tax. For example, the law has already been clearly settled that with respect to the gift of the corpus of the trust the transfer is not consummated so long as the donor continues to retain dominion and control over the property either in the form of a power of revocation, as here, or even of a power to modify and change the beneficiaries. The rationale is that taxation is based upon the *actual command* over the property taxed, and that while the power of revocation stood uncanceled, the gifts were inchoate and imperfect. If the law is so clearly settled with respect to the distribution of the trust *corpus* there is no reason why distribution of the trust *income* should not be subject to gift tax upon precisely the same principles.

As a further analogy supporting the proposition that the distribution of the income is subject to gift tax, the law is firmly settled that it would be taxable as income here to the taxpayer. Section 166 (1) of the Revenue Acts of 1932 and 1934 fully substantiates this fact. It is further established by the decisions of the Supreme Court, which enunciate the same principle applied in the corpus cases, namely, that taxation is primarily concerned with the actual command over the property taxed. The point stressed by the Supreme Court is that taxpayer in effect retained title to the income in the form of a power to stop payment at any time. Thus it seems clear that the income is taxable to the settlor so long as its disposition

is in reality still at his discretion, and from this it logically follows that when the income is actually disposed of, it should then be taxable as a gift from the taxpayer to the donee.

In reaching the conclusions above, we have treated this case as if taxpayer alone had the power to alter, amend and revoke the trust. This assumption is fully justified, despite the fact that taxpayer was to exercise it in conjunction with his counsel and his brother, Harry Warner. Neither of these parties had a substantial adverse interest in the disposition of the income or principal of the trust.

II

In computing his annual gifts to an insurance trust, taxpayer is not entitled to exclusions up to \$5,000 for each beneficiary upon payments of the yearly premiums on the policies. Since the trustees could not collect and distribute the proceeds until taxpayer's death, it is clear that the premium payments constituted gifts of future interests under Section 504 (b) of the Revenue Act of 1932.

ARGUMENT

I

Taxpayer is subject to gift tax in each year with respect to the amounts of income paid to the beneficiaries of a trust of which he is the real as distinguished from the nominal grantor and which he has the power to alter, amend or revoke at any time during his life

Our principal contention in this case focuses upon a trust created by Albert Warner on May 26, 1932,

under the provisions of which the taxpayer, his wife and son were the beneficiaries and taxpayer was the recipient of the corpus in the event of revocation. Taxpayer, together with the third brother, Harry Warner, and his attorney, Stanleigh Friedman, had the joint power to revoke at any time. We submit that under the circumstances of this case, taxpayer is the real grantor of the trust created by his brother, Albert Warner; further that because he has retained the power to revoke, along with two other persons having no adverse interest, he is subject to gift tax with respect to the income from the trust distributed to members of his family.

A. Taxpayer is the real grantor of the trust created by his brother, Albert Warner

The facts are that almost simultaneously taxpayer and his two brothers created trusts containing two million dollars each, invested in United States Government obligations. The trusts were drafted with the acknowledged purpose of minimizing and avoiding estate taxes. (R. 114.)¹ They were substantially identical in form except as to the beneficiaries and the recipients of the corpus on revocation. The basic principle here was to achieve the desired objective by the circuitous method of creating reciprocal trusts. Each brother was to have a trust precisely identical with the one which he would have created for the benefit of himself and his family, but instead of establishing it directly it was arranged that Albert

¹ The purposes of the trust have been set forth at R. 114 and are recited in the Statement of Facts, *supra*.

Warner's trust should be for the benefit of the taxpayer, taxpayer's trust for the benefit of Harry, and Harry's trust for the benefit of Albert. Referring to this trust arrangement the Board of Tax Appeals made the following finding of fact (R. 115):

It does not appear that any one of the Warners would have created a trust for the benefit of his brother's family had not the other two agreed at the same time to create similar trusts but, on the contrary, the creation of each was dependent upon and in consideration of the creation of the other two.

Under these circumstances, we submit that taxpayer must not be permitted both to keep his cake and eat it. The trust created by Albert Warner was clearly his trust in every respect except for a formality, namely, that Albert had established it in consideration of the creation of an equal and identical trust for his benefit.

a) The decisions amply justify the conclusion that the Albert Warner trust should be treated as taxpayer's trust. An almost identical situation arose in the case of *Lehman v. Commissioner*, 109 F. (2d) 99 (C. C. A. 2d), in which the decedent-taxpayer agreed to transfer an interest in bonds and stocks in trust for his brother Allan and his issue in consideration of Allan's transferring an equal share in trust for the decedent and his issue. Under the two trusts set up by the decedent, Allan was given the power to withdraw \$75,000 and similarly the decedent had the power to withdraw the same amount from Allan's trusts. For purposes of assessing the estate tax on the decedent's estate,

the Commissioner determined that the decedent's right to withdraw \$75,000 in the case of two trusts rendered \$150,000 of the trust includible in his gross estate. The court pointed out that the present case was in substance the same as if the taxpayer had transferred his share of the property to trustees for his own life and had reserved the power to withdraw \$150,000 from the principal, and pointed out further (p. 100):

The fact that the trusts were reciprocated or 'crossed' is a trifle, quite lacking in practical or legal significance. In *re Perry's Estate*, 111 N. J. Eq. 176, 162 A. 146. The law searches out the reality and is not concerned with the form. See *Matter of Orvis' Estate*, 223 N. Y. 1, 8, 119 N. E. 88, 3 A. L. R. 1636.

The Court further said, at page 100:

While section 302 (d) speaks of a decedent having made a transfer of property with enjoyment subject to change by exercise of power to alter, amend or revoke in the decedent, it clearly covers a case where the decedent by paying a quid pro quo has caused another to make a transfer of property with enjoyment subject to change by exercise of such power by the decedent. See 52 Harvard Law Review 1015. 'A person who furnishes the consideration for the creation of a trust is the settlor, even though in form the trust is created by another.' Scott on Trusts, section 156.3.

See also *Jackson v. Commissioner*, 64 F. (2d) 359 (C. C. A. 4); *Whiteley v. Commissioner*, 120 F. (2d) 782 (C. C. A. 3).

In addition to the *Lehman* case, which is squarely in point, there are analogous decisions by the Supreme Court which establish that the substance of this transaction must be emphasized above its form. For example, in *Chase Nat. Bank v. United States*, 278 U. S. 327, the Supreme Court held that the proceeds of certain insurance policies on decedent's life, respecting which the insured reserved the right to change the beneficiary and paid the premiums, were includible in the decedent's gross estate for estate tax purposes. The beneficiaries' interests in the policies were not transferred to them from the decedent but from the insurer and hence there was nothing to which a transferor privilege tax could apply, but the Supreme Court pointed out that the word "transfer" in the statute could not be construed in such a restricted sense, saying (p. 337, 338):

It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another. Sec. 402 (c) taxes transfers made in contemplation of death. It would not, we assume, be seriously argued that its provisions could be evaded by the purchase by a decedent from a third person of property, a savings bank book, for example, and its delivery by the seller directly to the intended beneficiary on the purchaser's death, * * *.

* * * We think the power to tax the privilege of transfer at death cannot be controlled by the mere choice of the formalities which may attend the donor's bestowal of benefits upon an-

other at death, or of the particular methods by which his purpose is effected, * * *.²

By the same token the fact that the taxpayer's family received income from Albert's trust rather than from his own should not affect the taxability of the transfer since the trusts were set up on a three-way reciprocal basis.

The same principle is demonstrated by *Helvering v. LeGierse*, 312 U. S. 531, in which the Court was faced with the question whether certain "insurance proceeds" should be included in the decedent's gross estate. On preliminary examination, the proceeds appeared clearly to be proceeds from an insurance policy just as the income was from Albert Warner's trust, but the Court took into consideration the fact that decedent had simultaneously taken out an annuity contract. Under these circumstances, it decided that there was no insurance risk, since the insurance policy would not have been issued without the annuity contract, and the risk involved in decedent's early death was compensated by an aliquot reduction in annuity liability. Thus, it is established that in various branches of tax law the Supreme Court has stressed the importance of examining the substance of the transaction as distinguished from the single item upon which the tax is based.

² This construction of the "transfer" referred to under the estate tax law is equally applicable to gift tax cases because the two taxes are *in pari material* and subject to the same construction. *Estate of Sanford v. Commissioner*, 308 U. S. 39.

B. If the taxpayer is the real grantor of the Albert Warner trust, he is subject to a gift tax upon the payments of income made to the members of his family

In considering the question of the liability of the taxpayer for gift taxes upon payments of income made from the Albert Warner trust to members of the taxpayer's family, Section 501 (c) of the Revenue Act of 1932 (appendix, *infra*) is applicable to the first two of the three years' income, i. e., the years 1932 and 1933. The provision of Section 501 (a) is that a tax shall be imposed "upon the transfer by any individual * * * of property by gift, * * *." Referring to this tax, subsection (c) provides as follows:

The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.

It is true that subsection (c), above, was repealed by Section 511 of the Revenue Act of 1934, so for the year 1935 (which is also involved here) there is no statute which covers expressly the taxing of gifts where the donor has retained the power to revoke. Nevertheless, precisely the same rule still applies, for

it is definitely settled that subsection (c) was repealed solely because the decision by the Supreme Court in *Burnet v. Guggenheim*, 288 U. S. 280, was deemed to cover the point without statutory direction. This is established by the committee reports, and further verified by the Supreme Court in *Estate of Sanford v. Commissioner, supra*, where the Court said (p. 45, in fn. 1):

Section 501 (c) of the 1932 Act added a new provision that transfers in trust, with power of revocation in the donor, should be taxed on relinquishment of the power. This was repealed by Sec. 511 of the Act of 1934, 48 Stat. 680, because *Burnet v. Guggenheim*, 288 U. S. 280, had declared that such was the law without specific legislation. H. R. No. 704, 73d Cong., 2d Sess., p. 40; Sen. Rep. No. 558, 73d Cong., 2d Sess., p. 50.

See also *Hesslein v. Hoey*, 91 F. (2d) 954, (C. C. A. 2d), certiorari denied, 302 U. S. 756.

Section 501 (c), set forth above, raises two fundamental questions. The first is whether taxpayer's power to alter, amend and revoke the trust jointly with his brother Harry Warner and his counsel Friedman (see R. 73-75, 114), is being exercised "in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, * * *." This question will be separately considered later in this brief. (C. *infra*). For the purposes of the succeeding discussion we shall make the assumption that Harry Warner and Friedman do not have adverse interests, and shall therefore

treat the case as if the taxpayer might exercise the power to alter, amend, and revoke the trust alone.

(1) Upon this premise it seems clear that the payment of income to the taxpayer's wife and child from the trust in the taxable years constitutes a gift of income in those years. We submit that this question is settled conclusively by the language of Section 501 (c). As pointed out by the dissenting Board Member (R. 118-119; see also dissent in *Estate of Mead v. Commissioner*, 41 B. T. A. 424, at p. 429), that section provides:

The [gift] tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor * * * but * * * any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.

Here the facts are that the donor retained the power to revest title to the property, and the payments of income involved were to beneficiaries other than himself—all in accordance with the statutory provision, above. The case therefore fits perfectly within the literal language of the statute. The Committee Reports under the Revenue Bill of 1932 further illustrate this fact. H. Rep. No. 708, 72d Cong., 1st Sess., p. 28, 1939-1 Cum. Bull. (Part 2) 457, 477, referring to Section 501 of the bill imposing the gift tax stated:

* * * where A creates a revocable trust naming B as beneficiary, a gift to B of the corpus is effected when A relinquishes the power to revoke or the power is otherwise terminated in B's favor (the income payments to B in the

interim being gifts from A in the calendar years when received).

This position has been taken consistently by the Commissioner since the Revenue Act of 1924. See I. T. 2145, IV-1 Cum. Bull. 43 (1925). It is also in accordance with the Regulations applicable during 1932-1936. Regulations 79, 1933 and 1936 editions, Article 3.

(2) Furthermore, although there are no cases precisely in point there are numerous analogous situations which compel the conclusion that taxpayer is subject to a gift tax. For example, the law has already been clearly settled that with respect to the gift of the corpus of the trust a transfer is not consummated so long as a donor retains *dominion* and *control* over the property, either in the form of a power of revocation or even a power to modify and change the beneficiaries. In *Burnet v. Guggenheim*, 288 U. S. 280, the Court held that where trusts were created in 1917, a settlor reserving the power to modify, alter or revoke and relinquishing it in 1925 was subject to the gift tax under the Revenue Act of 1924. The Court pointed out that (pp. 283-284):

“Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid.” *Corliss v. Bowers*, 281 U. S. 376, 378. (Cf. *Chase National Bank v. United States*, 278 U. S. 327; *Saltonstall v. Saltonstall*, 276 U. S. 260; * * *. While the powers of revocation stood uncanceled in the deeds, the gifts, from the point

of view of substance, were inchoate and imperfect. By concession there would have been no gift in any aspect if the donor had attempted to attain the same result by the mere delivery of the securities into the hands of the donees. A power of revocation accompanying delivery would have made the gift a nullity. * * * By the execution of deeds and the creation of the trusts, the settlor did indeed succeed in divesting himself of title and transferring it to others * * *, but the substance of his dominion was the same as if these forms had been omitted. * * *

And the Court further said (p. 286):

The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall.

The Court then pointed out (pp. 286-287) that the gift and estate tax provisions are *in pari materia* and that the construction adopted in the estate tax cases was equally applicable to the gift tax.

c) The principles set forth in Burnet v. Guggenheim, *supra*, were further amplified by the Supreme Court in Estate of Sanford v. Commissioner, 308 U. S. 39. There it was held that a gift in trust with a reservation by the donor of the power to alter the disposition of the property in any way not beneficial to himself was incomplete and was not subject to gift taxes until he renounced it. See also Rasquin v. Humphreys, 308

U. S. 54. Besides applying *Burnet v. Guggenheim*, the Supreme Court rested its decision (p. 48) upon the proposition that the gift tax supplemented the estate tax and that *Porter v. Commissioner*, 288 U. S. 436, had held that a trust reserving the power to change the beneficiary was taxable as part of the donor's gross estate.

Now, if the law is so clearly settled with respect to the distribution of the trust corpus the next question is why distribution of the trust income should not also be subject to gift tax upon precisely the same principles.³ Control of the income through the power of revocation should be the governing consideration irrespective of the location of technical title. The Board of Tax Appeals concluded to the contrary (R.

³ Commenting generally upon the question, Roswell Magill has said (The Federal Gift Tax, 40 Col. L. Rev. 772, 875) :

A related problem is the gift tax liability with respect to the annual payments of income to the beneficiaries of a trust, subject to such a power to alter or revoke that its creation does not subject the settlor to a gift tax. Granted that the gift of corpus is incomplete, so that the property must be regarded as still part of the settlor's estate, each transfer of income to the beneficiary appears to be a completed gift. Hence the donor should be taxable thereon. A recent Board decision takes a contrary view, however, four members dissenting. [*Giles W. Mead*, 41 B. T. A. 424 (1940).] The reasoning of the majority—that until the donor alters or amends the trust, the beneficiary is the owner of the income—seems inadequate in the light of the analysis adopted in the *Sanford* case. Here are completed transfers being made to another during the donor's life out of property which admittedly will be part of his estate when he dies, yet no gift tax is imposed. It is submitted that it is unsafe to rely upon the Board's decision until it is affirmed, or until other similar cases are decided.

117), relying upon the case of *Estate of Mead v. Commissioner*, 41 B. T. A. 424, which was appealed but later settled and the appeal dismissed. The *Mead* opinion states that the rationale of the decisions applicable to gifts of corpus is not controlling because the indenture entitled the beneficiary to the net income of the property held in trust during her lifetime or until the donor exercised his power of modification. The Board further held that the beneficiary became the owner of an equitable interest in the corpus of the trust property, subject to being divested by the happening of a subsequent event, and continued, saying (p. 428):

By virtue of this interest in the corpus of the trust she was entitled to enforce the trust, to have a breach of trust enjoined, and to require the net income to be paid over to her by the trustee. The interest was present property, alienable like any other in the absence of a valid restraint upon alienation * * *. Since the net income was currently distributable to her, it became her property within the meaning of the taxing statutes at the time of its receipt by the trustees. * * *

But the foregoing presents no logical distinction from the cases dealing with gifts of the corpus of a trust. It may be true that the income beneficiary became an owner of an equitable interest in the corpus subject to being divested, but this is precisely the status of beneficiaries who are donees of the corpus. See *Burnet v. Guggenheim*, *supra*, p. 284. In situations like the *Sanford* case and *Burnet v. Guggenheim*,

just as in the *Mead* case, the beneficiaries of the corpus would be entitled to enforce the trust and to have a breach of trust enjoined and further to have the corpus paid to them at the specified time if the power to revoke had not been exercised. Their interest also (like the right to income) would be alienable and assignable, but subject to divestment.

It may also be true, as stated by the Board of Tax Appeals in the *Mead* case that (p. 429):

* * * when net income from trust property accrued there arose an obligation of the trustee to distribute such income to the beneficiary of the trust. The distribution was in satisfaction of that obligation and not a gift of income * * *

But this merely evades our basic contention here. The facts are that even if an obligation arose when the net income accrued, the date of its creation *as an obligation* marks the occasion of the gift from the taxpayer to the beneficiaries. Only when the taxpayer has lost the power to revoke the beneficiaries' right to income can it be said that the gift is completed and taxable to the donor. Until that time he still retained actual command over its distribution, the point which the Court emphasized in *Burnet v. Guggenheim, supra* (see p. 283).⁴

⁴ The language of *In re Hoyt's Estate*, 149 N. Y. Supp. 91 (Surrogate's Ct., N. Y. Cty.) expressed our position with great clarity. There it was held that where a donor executes a trust deed conveying certain real estate, the income to be paid to her son for life, with remainders over, but reserves absolute power to amend or revoke the deed, the conveyance was upon the donor's death sub-

The *Guggenheim* case in two separate dicta has in fact stated that there is no logical justification for applying the gift tax to the corpus and not to the income. At p. 284 the Supreme Court said:

As to the principal of the trusts and as to income to accrue thereafter, the gifts were formal and unreal. They acquired substance and reality for the first time in July, 1925, when the deeds became absolute through the cancellation of the power.

And again at pp. 289-290, the Court concluded as follows:

The argument for the respondent, if pressed to the limit of its logic would carry him even further than he has claimed the right to go. If his position is sound that a power to revoke does not postpone for the purpose of taxation the consummation of the gift, then the income of these trusts is exempt from the tax as fully as the principal. What passed to the beneficiaries was the same in either case, an interest inchoate and contingent till rendered absolute and consummate through receipt or accrual before the act of revocation. Congress did not mean that recurring instalments of the income,

ject to a transfer tax. The portion of the opinion which bears out our contention appears in the following quotation (p. 93):

When the cestui que trust received an installment of the income of the trust fund, that constituted a valid gift of the installment, but each installment might be the last, as the donor might revoke the deed before the new installment became due. It was not therefore until the death of the donor that the gift in any aspect became absolute, and that the cestui que trust became irrevocably entitled to the income of the trust property.

payable under a revocable conveyance which had been made by a settlor before the passage of this statute, should be exempt, when collected, from the burden of the tax.

In other words, the trustees' obligation to distribute and the beneficiary's right to receive each installment of income were always subject to a power of revocation until the income had become vested and payable. Likewise here, in view of the fact that the taxpayer, his brother and counsel could exercise their power of revocation "at any time" (R. 73), it seems clear that the beneficiaries' right to any year's income could be cut off up to the date when it became vested and properly "payable and distributable by the trustees" under the provisions of the indenture⁵ (see R. 75). Since it is self-evident that 1932, 1933, and 1935 income could under no circumstances constitute an obligation to the beneficiaries before its receipt by the Trustees, it logically follows that it must be taxable as a gift in those years.

(3) Further to support the proposition that the distribution of the income here is subject to *gift tax*, the law is settled that it would be taxable as *income* to the taxpayer. Section 166 (1) of the Revenue Acts of 1932 and 1934 fully substantiates this fact. It is further established by the decision of the Supreme

⁵ The indenture provides that the trustees shall pay over to the beneficiaries "the entire net annual income therefrom in each year" during their lives, etc. (R. 52, 53). We construe this provision to say that the income is payable at the end of the year, but not necessarily before that time. However, for the purposes of our argument, the question is not important to decide.

Court in *Corliss v. Bowers*, 281 U. S. 376. The basic principle there is the same as was later applied in the corpus cases, including *Burnet v. Guggenheim*, *supra* (see B. (2) above). In *Corliss v. Bowers*, the petitioner created a trust under which his wife has to receive the income for life, reserving to himself the power at any moment to abolish or change the trust at his will. The Court held that the income of the trust was taxable to the grantor for income tax purposes and said (pp. 377-378):

But the net income for 1924 was paid over to the petitioner's wife and the petitioner's argument is that however it might have been in different circumstances the income never was his and he cannot be taxed for it. The legal estate was in the trustee and the equitable interest in the wife.

But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power.

While the case relates to income tax, its application to transfers is obvious even without the reliance by

the Court on the "transfer" cases, including *Saltonstall v. Saltonstall*, 276 U. S. 260; *Chase Nat. Bank v. United States*, 278 U. S. 327, and *Reinecke v. Northern Tr. Co.*, 278 U. S. 339. As already noted, both lines of cases are the product of the same underlying theory. The basic principle of *Corliss v. Bowers*, is that while "actual command" over disposition of the income is retained, taxpayer cannot be deemed to have disposed of it. The income is therefore taxable to him and its disposition is in effect at his direction. From this it follows logically that when the income is actually disposed of, it should be taxable as a gift from the taxpayer to the donee.

Further in connection with the *Mead* case, it should be noted that the Board of Tax Appeals actually rested its decision in part upon the the issue whether the income of the trust would be taxable to the donor. But there the donor had retained only the power to change the beneficiaries (without naming herself), and the Board concluded (p. 429):

It should be borne in mind that the trust involved herein is not a revocable trust of such a nature that the income therefrom would be taxable to the donor. *Knapp v. Hoey*, 104 Fed. (2d) 99; *Ellsworth B. Buck*, 41 B. T. A. 99. Since the income will not be considered for purposes of taxation as having been received by the donor of the trust, it would appear illogical to consider it as being the subject of a gift from the donor of the trust to the beneficiary.

Here, on the other hand, the taxpayer retained the power of *revocation*, so upon the Board's own

premises be would be taxable with the income of the trust, and therefore subject to a gift tax in the event of its distribution.⁶

⁶ Though we do not need to go so far in the case at bar, we call the Court's attention to the recent decisions establishing that even upon the facts in the *Mead* case (i. e., where the donor retained the power to change the beneficiaries, as distinguished from the power of revocation), the donor was properly taxable with the income of the trust. Since the *Mead* case was decided, *Buck v. Commissioner*, 41 B. T. A. 99, upon which the Board relied, has been reversed by the Circuit Court of Appeals for the Second Circuit, 120 F. (2d) 775. It is true that in the quoted opinion above, the Board also relied upon *Knapp v. Hoey*, 104 F. (2d) 99, but the facts are that the latter case was decided by the same Circuit Court of Appeals (for the Second Circuit) long before it decided *Commissioner v. Buck*. The *Buck* decision did not actually overrule *Knapp v. Hoey*, *supra*, but merely passed over it, pointing out that it was decisive as to the application of Sections 166 and 167, but did not raise the question of the application of Section 22 (a).

The rule now established is that even though there is no statute providing expressly for the taxability of the income to the settlor where he has retained the power to change his beneficiaries, nevertheless it is taxable to him under the broad definition of income (under Section 22 (a)). The underlying theory is that where the settlor retained the economic satisfactions of ownership *after* the creation of the trust as *before*, the Commissioner was justified in continuing to tax him upon its annual income. See also *Commissioner v. Brown*, 112 F. (2d) 800 (C. C. A. 3d). We earnestly request the Court to read the opinion of the Circuit Court of Appeals for the Second Circuit in the *Buck* case as an excellent summary of the effect of three recent decisions of the Supreme Court upon broadening the taxability of income to the settlor or donor. *Helvering v. Clifford*, 309 U. S. 331; *Helvering v. Horst*, 311 U. S. 112; and *Harrison v. Schaffner*, 312 U. S. 579. Under these circumstances, if the taxpayer here is liable to pay an income tax not only by reason of the express provisions of Section 166, but also under the broad definition of income of Section 22 (a), then it seems even more reasonable that the distribution of that income should constitute a transfer subject to the gift tax.

C. Taxpayer's counsel and brother do not have a substantial interest adverse to the taxpayer in exercising the power of revocation

A further question to be considered is whether taxpayer's power to revoke, jointly with his counsel Stanleigh Friedman and his brother Harry Warner, would be exercised in conjunction with persons having a substantial adverse interest, within the meaning of Section 504 (c). We submit that under the circumstances of this case neither the counsel nor Harry Warner represent substantial interests which are adverse to the taxpayer.

Our conclusion with respect to Friedman is readily justified. If taxpayer's counsel would not follow his wishes with respect to the exercise of such a power it would be difficult to find anyone whose interests would not be considered adverse. It appears from the record that Friedman did not participate in any way in the distribution of either the principal or income of the trust, and that he had been the personal counsel and adviser to the Warner brothers from 1912 to date. (R. 43.) There was thus no basis for claiming that Friedman would not be amenable to the taxpayer's wishes. The cases fully substantiate the proposition that under these circumstances counsel cannot be deemed to have a substantial adverse interest. See *Reinecke v. Smith*, 289 U. S. 172; *Morton v. Commissioner*, 109 F. (2d) 47 (C. C. A. 7th).

Similarly, it is impossible to say that Harry Warner had a substantial interest adverse to the taxpayer. In fact, we question whether he had any adverse interest at all. In this connection, it must be remembered

that here we are concerned with a gift tax solely upon the *income* of the trust, so the only question is whether Harry Warner's interest in the *income* of the trust might be adverse to a determination by taxpayer to exercise the power to alter, amend or revoke. Here the facts are that the income in the years involved had to be distributed pursuant to the terms of the trust instrument to the taxpayer, his wife and son—all of whom were then living; under these circumstances Harry Warner could actually never expect to receive any of the income and thus had no "interest" whatever in it. It therefore follows that Harry would have no *adverse interest* if the taxpayer chose to alter the terms of the indenture and change the distributees of the trust income.

Furthermore, even if it may be said that Harry Warner had an adverse interest in the distribution of the corpus, this interest was entirely contingent, upon three factors:⁷ (1) the death of the taxpayer's son prior to the termination of the trust without issue living at that time, (2) upon his (Harry's) surviving at the termination of the trust, and (3) upon the non-existence of next of kin of taxpayer having superior rights at that time, e. g., taxpayer's children other than the son specifically mentioned. (R. 53-54; 55-56; 56-58; 58-60.) Even upon satisfaction of all of these conditions Harry would merely share as one of the persons who could take under the laws of New York

⁷ There was also a provision that the taxpayer's son might direct payment of a part of the trust *res* to his (the son's) wife, by his Last Will and Testament.

if the taxpayer had died seized and possessed of the property. Thus it appears that Harry might stand to receive as much by inheritance, as one of the next of kin or a beneficiary under taxpayer's will, as he would by the terms of the trust instrument. Under these circumstances we submit that his adverse interest, if any, is obviously nominal and technical rather than substantial in fact, as the statute requires. See *Commissioner v. Caspersen*, 119 F. (2d) 94 (C. C. A. 3d), certiorari denied, October 13, 1941.

Finally, as a practical matter, in view of the close family tie-up and the general scheme of setting up three reciprocal trusts here taxpayer cannot say there was a substantial possibility that Harry Warner would refuse to cooperate. The facts are that Harry, Albert and taxpayer were all very rich and the whole purpose of simultaneously setting up three trusts of \$2,000,000 each was to protect their own families. The purpose was understood by all three and they all appeared to have implicit confidence in each other. Together they were running the motion picture business bearing their name; in 1927 they had formed a personal holding company called Renraw, Inc., for the purpose of obtaining greater economic security in respect of their private fortunes; until his death in 1931 they all looked upon Lewis Warner, Harry's son, as the family representative and the one who might be expected to take care of their wives and children. (R. 38-43.) In other words, their personal as well as business relationship was close enough to attempt another joint

project, this time for the purpose of minimizing their personal tax liability.⁸

With this understanding of the relationship between the brothers, it seems clearly unreasonable to claim that Harry Warner has a substantial adverse interest. The question is a practical one and cannot be decided in a legal vacuum. *Fulham v. Commissioner*, 110 F. (2d) 916 (C. C. A. 1st). Here no one who is realistic can deny that the persons in whom the joint power of revocation was vested would respect the taxpayer's preference. The cases bear out the proposition that where the so-called adverse interest is subject to so many contingencies and further where there was a close family unit, such interest could not properly be deemed substantial as required by the statute. See *Fulham v. Commissioner, supra*; *Commissioner v. Caspersen, supra*; *Morton v. Commissioner, supra*.

II

Taxpayer's payment of premiums on insurance policies held in trust constituted gifts of future interests in property

As the Board of Tax Appeals has indicated (R. 117), the only other question remaining for deci-

⁸ It is true that taxpayer had no *direct* control over the trust of which Harry Warner's family was the beneficiary and of which he (the taxpayer) was the nominal grantor; there the persons having the power to revoke were Harry Warner or Albert Warner. However, the facts are that in the trust of which Harry Warner was the nominal grantor and Albert Warner's family were the beneficiaries (Albert having a joint power to revoke) the taxpayer could refuse to cooperate and in this way could exert a pressure on Albert Warner to prevent revocation of the trust for the benefit of Harry Warner.

sion is whether taxpayer is entitled to annual exclusions up to \$5,000 for each beneficiary in computing his annual gift to an insurance trust resulting from payment of the annual premiums. Pursuant to the terms of the trust indenture, the trustees were to collect the proceeds at taxpayer's death and distribute a part to his son and his then wife if they survived, with remainders over (R. 84-85), and hold the balance, distributing the income to the same parties (R. 86-87, 118). The Board of Tax Appeals held that the payment of the premiums constituted gifts of present interests under Section 504 (b) of the Revenue Act of 1932, citing cases, and concluding as follows: "Contra *U. S. v. Ryerson*, — Fed. (2d) — (7/9/40)." Since the Board's decision the Supreme Court has affirmed the *Ryerson* case, *Ryerson v. United States*, 312 U. S. 405.

Section 504 (b) of the Revenue Act of 1932 provides that the first \$5,000 of each gift other than gifts of future interests of property shall be excluded for the purposes of taxation. We submit that the gifts here involved are gifts of future interest and hence that no exclusions are allowable. This Court has already decided the identical question in favor of the Commissioner in *Commissioner v. Boeing*, on October 23, 1941, not yet reported, saying:

Under the very recent decisions in *United States v. Pelzer*, 312 U. S. 399, and *Ryerson v. United States*, 312 U. S. 405, it is clear that the gifts in the case before us were of future interests so far, at least, as concerns the proceeds and the income from the proceeds of the policies

themselves. These mature only on the death
of the trustor. * * *

Under these circumstances we submit that taxpayer
is entitled to no exclusions in respect of the payment
of premiums upon policies held in the insurance trust.

CONCLUSION

The decision of the Board of Tax Appeals is wrong
and should be reversed.

Respectfully submitted,

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DECEMBER, 1941

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift. (U. S. C., Title 26, Sec. 550.)

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SEC. 504. NET GIFTS.

(a) General Definition.—The term “net gifts” means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) Gifts Less Than \$5,000.—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first \$5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year. (U. S. C., Title 26, Sec. 553.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 511. GIFTS OF PROPERTY SUBJECT TO POWER.

Subsection (c) of section 501 of the Revenue Act of 1932 (relating to the inapplicability of gift tax in the case of the transfer of property in trust subject to the power of the donor to revest title in himself) is repealed. (U. S. C., Title 26, Sec. 550.)

Treasury Regulations 79 (1936 Ed.):

ART. 3. *Cessation of donor's dominion and control*.—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no

power to cause the beneficial title to be revested in himself, the gift is complete. But a transfer (in trust or otherwise), though passing both legal and beneficial title, is still in essence merely formal so long as there remains in the donor a power to cause the revesting of the beneficial title in himself, and the gift, from the standpoint of substance, remains incomplete during the existence of the power. A donor shall be considered as having the power to re-vest in himself the beneficial title to the property transferred if he has such power in conjunction with any person not having a substantial adverse interest in the disposition of the property or the income therefrom. A trustee, as such, is not a person having a substantial adverse interest in the disposition of the trust property or the income therefrom. The relinquishment or termination of the power, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply.¹ The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the formal transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the donor's power to receive it himself, and constitutes a gift of such income or of such other enjoyment taxable in the calendar year of its receipt.

If the donor contends that a power retained by him constitutes beneficial dominion and con-

¹ So held in *Burnet v. Guggenheim* (288 U. S., 280, 53 S. Ct., 369) of a transfer in trust, made in 1917, with power in the donor to revoke, which power he relinquished in 1925, the relinquishment being treated a gift subject to the tax imposed by the gift tax title of the Revenue Act of 1924.

trol, and that by reason thereof the transfer is not in substance a gift, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument by which the transfer was made, should be submitted.

ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. “Future interests” is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commerce in use, possession, or enjoyment at some future date or time. * * *

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
v.
JACK L. WARNER,
Respondent.

ON PETITION FOR REVIEW OF DECISION OF THE
UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 9909

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
v.

JACK L. WARNER,
Respondent.

ON PETITION FOR REVIEW OF DECISION OF THE
UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

Preliminary Statement

This is a petition by the Commissioner of Internal Revenue to review a decision of the Board of Tax Appeals entered in favor of the respondent on December 13, 1940 (R. 120). The appeal involves gift taxes alleged to be due from the respondent for the calendar years 1932, 1933 and 1935. The opinion of the United States Board of Tax Appeals is reported at 42 B.T.A. 954, and is to be found at pages 112 to 119 of the Record in this appeal.

The Supreme Court of the United States having rendered its opinion in *Ryerson v. U. S.*, 312 U. S. 405, the respondent herein admits that assignment of error No. 6 (R. 125), is correct and that the decision of the Board of Tax Appeals should be modified accordingly. This eliminates further consideration of Question numbered 2 (petitioner's brief, pp. 2, 7).

Statement of Facts

The opinion of the Board of Tax Appeals adopted the facts as stipulated (R. 113). They may be summarized as follows:

The three Warner brothers, Harry, Albert and Jack L. Warner, were at all times and still are the principal executive officers of Warners Bros. Pictures, Inc., a Delaware corporation, which in 1923, acquired the assets of a partnership then composed of the aforesaid three brothers and a fourth brother, Samuel L. Warner, since deceased. The partnership was engaged in the business of producing and distributing silent motion pictures and the corporation continued the business of the partnership, and since 1926 has been a producer, distributor and exhibitor of talking motion pictures. Until the time of his death in October, 1927, Samuel L. Warner, the deceased brother, was one of the principal executives of the corporation, as was Lewis J. Warner, the son of Harry M. Warner, up until the time of his premature death in April, 1931 (R. 37).

The motion picture business engaged in by Warner Brothers, the partnership, and by the corporation, Warner Bros. Pictures, Inc., was speculative and fluctuating (R. 39). With the advent of "sound", the busi-

ness of the corporation rapidly expanded, but continued to be hazardous and volatile. The stock of Warner Bros. Pictures, Inc. fluctuated violently on the New York Stock Exchange. From January 1926 through September 1926 the market quotations rose from \$15 to \$70 a share. From May 1927 to April 1928 the price had receded to as low as \$30 a share. But in September and October 1928 the stock advanced to as high as \$138 a share, but receded in March 1929 to \$100 a share. Thereafter it was split two for one and in November 1929 sold at \$30 per share (new stock), a decline of 40 points from the previous March. But in March, April and May 1930, the new stock sold at \$80 a share or an equivalent of \$160 for each share of the old stock. In June 1930 the price declined again to \$45 a share; in August 1930 to \$25 a share and in June 1931 to \$5 a share and finally in May 1932 to 75 cents a share (R. 38). The date of the Trust Indenture involved is May 26, 1932.

In 1928 and 1929, each of the three Warner brothers was the owner of a substantial fortune invested almost entirely in Warner Bros. Pictures, Inc. securities. The corporation in which their fortunes were so invested had been in frequent need of financing, and particularly in its process of expansion, became at times heavily indebted to banks and bankers for borrowed money. Believing that they would obtain greater protection for their investments in the company and assure the company a stronger financial position, the Warners determined to liquidate a part of their holdings in securities of the company, so as to make cash available which they could loan to it as and when needed. This, they proceeded to do, with resulting accumulation of large cash reserves

which from time to time, through the medium of Renraw Inc., a corporation owned by them, were loaned to the Warner Corporation, at one time indebted to them for cash loans of between five and six million dollars (R. 38).

Renraw, Inc., incorporated under the laws of the State of New York in 1925, had an original capital of 500 shares equally divided among the Warner brothers. On July 27th, 1929, in connection with an increase in the capital of Renraw, Inc., 60,000 shares of new preferred stock were issued in equal amounts to the three brothers, in consideration of the payment by them of \$6,000,000 in cash, obtained by them through the sale of Warner Bros. Pictures Inc. stock as aforesaid (R. 39).

Increasing profit in the operation of its business during the years 1929 and 1930, made it possible for Warner Bros. Pictures, Inc., to repay to Renraw, Inc. substantial amounts of the foregoing loans and the balance thereof was liquidated when the corporation secured funds by new financing in September, 1930 (R. 39).

At this point the Warner brothers, realizing that they were in a position to segregate a part of their resources and remove the same from existing hazards of the motion picture business, began in March, 1930, through Renraw, Inc., to purchase United States Government obligations, which they did to the extent of \$5,600,000 of such obligations (R. 39-41). This completed the *first step* in their projected plan of economic security for themselves, their wives and their children.

While the business was building up and the Warner resources were increasing, Lewis J. Warner, the only son of Harry M. Warner, oldest of the Warner brothers, and who was himself an employee and officer of Warner Bros. Pictures, Inc., was regarded by his father and uncles as

the ultimate representative of the interests of the Warner family in the corporation of Warner Bros. Pictures, Inc. (R. 37). The death of Lewis Warner on April 4, 1931 was a great shock to his father and had an important effect upon the plans of the father and uncles in the arrangement of their personal fortunes. They could no longer look to Lewis as the one who might be expected to take care of the wives and children of the Warner family and to be the ultimate representative of the family interests. Accordingly, the Warner brothers after discussions among themselves and with their financial advisors concerning the best means to be employed to insure the financial security of themselves and their families and to protect that security against all exigencies decided to establish trust funds (R. 40, 41).

Each brother determined to transfer his \$2,000,000 of Government securities to a trust in such form that the corpus would be secured from the hazards of business, secured against any actions by the brothers individually or collectively or by the members of their immediate families, secured for the protection of the wives and children of the three Warners (R. 42). This completed the *second step* in their projected plan for security.

The decision to establish trust funds having been made, the capital of Renraw, Inc., was reduced and each of the Warner brothers surrendered to Renraw, Inc., the 20,000 shares of preferred stock owned by him and received an equal one-third of \$5,600,000 face amount of Government obligations, and other assets to the amount of \$400,000. The \$400,000 was used to purchase additional United States Government obligations so that each brother became, in December 1931, the owner of \$2,000,000 principal amount of U. S. Government obligations (R. 41, 42).

Having decided that the general objectives referred to above could be accomplished by the establishment of trust funds, the Warners consulted their counsel, Stanleigh P. Friedman, explained to him the objectives desired, and arranged for the representatives of Central Hanover Bank and Trust Company of New York City to co-operate with him in the preparation of definitive papers (R. 42). Mr. Friedman has been the advisor and counsel of the Warner brothers personally, and of the corporations in which they have been interested, and of members of the Warner families from 1912 to the present time. He has at all times enjoyed the confidence and affection of all members of the Warner families. To provide that in the event of the death of one of the brothers, his widow and children would not be subjected to the influence of the remaining two brothers, alone, because each brother had his own idea of policy and was not willing to subject his estate to different philosophies of investment of the surviving brothers alone, Mr. Friedman was integrated into each of the trusts as a permanent trustee and as one of those having joint power to amend or revoke (R. 43, 44). Neither Mr. Friedman nor the legal representatives of Central Hanover were consulted until after the Warner brothers had decided on the establishment of trusts to achieve the general objectives hereinbefore set forth. In the course of discussions which followed, counsel advised that the trusts be drawn in the form in which they were finally executed in order to carry out their intentions to:

- (a) secure a “maximum of irrevocability”^{*} by the grantor;
- (b) make it impossible for any one of the brothers to “invade the corpus”;
- (c) exclude any “possibility of reverter” of the corpus of any trust;
- (d) eliminate the grantor of each trust from becoming a possible income beneficiary;
- (e) provide that in the event of the death of any brother his widow and children would not be subject to the influence and divergent investment policies of the remaining brothers alone;
- (f) minimize and avoid estate taxes which counsel believed might be due under some different form of trust procedure than that which was adopted (R. 43, 44).

Therefore, and as the *final step* in their plans, on or about May 26th, 1932, Albert Warner, a brother of the respondent herein, executed an Indenture of Trust, bearing said date, of which a copy, as executed, is attached to the Stipulation of Facts as Exhibit A (R. 51-80). On or before June 4th, 1932, Albert Warner delivered said Indenture to the trustees named therein and delivered to Central Hanover, one of the trustees, on behalf of all of them, \$2,000,000 principal amount of United States Government obligations, which belonged to him and for which a receipt was executed and delivered to him by Central Hanover describing said securities by number and amount (R. 32).

^{*} Misquoted as “maximum of revocability” in the Opinion of the Board of Tax Appeals and in the Brief for Petitioner. (See Stipulation, par 18, R. 43.)

The income received by the trust executed by Albert Warner was entirely paid out to the beneficiaries and treated by them for Federal income tax purposes as taxable income for the years and in the amounts following:

	Jack L. Warner	Irma Warner	Jack M. Warner
1932.....	\$20,009.16	\$10,004.52	\$10,004.52
1933.....	35,542.25	17,774.49	17,774.49
1934.....	42,391.13	21,581.76	21,195.58
1935.....	37,174.97	16,678.18	18,581.60

(R. 35, 36)

Petitioner contends that the foregoing payments to Irma and Jack M. Warner were gifts to them by respondent.

Since the petitioner in his Statement of Facts has considered it convenient for comparison to tabulate significant provisions of the Albert Warner Trust and two other trusts created by his brothers (petitioner's brief, p. 4), we are constrained to point out his failure to include as one of the trustees in each trust, the person called by him the "nominal grantor". The petitioner's tabulation also contains the additional error that Harry M. Warner is named as a beneficiary of the trust in which the "taxpayer" is referred to as the "nominal grantor". To correct these errors and to prevent the confusion which might result from petitioner's self-serving reference to Jack as the "taxpayer", we submit the following accurate tabulation.

Grantor	Albert Warner	Jack L. Warner	Harry M. Warner
1. Beneficiaries	Jack L. Warner Irma Warner (divorced wife of Jack L.) Jack M. Warner (then a minor)	Rea Warner Betty Warner (Sperling) (then a minor) Doris Warner LeRoy (then a minor— wife and daughters of Harry M. Warner)	Albert Warner Bessie Warner
2. Trustees	Albert Warner Harry M. Warner Jack L. Warner Stanleigh P. Friedman Central Hanover Bank	Albert Warner Harry M. Warner Jack L. Warner Stanleigh P. Friedman Central Hanover Bank	Albert Warner Harry M. Warner, Jack L. Warner Stanleigh P. Friedman Central Hanover Bank
3. Persons having the joint power to amend and revoke	Jack L. Warner Harry M. Warner Stanleigh P. Friedman	Albert Warner Harry M. Warner Stanleigh P. Friedman	Albert Warner Jack L. Warner Stanleigh P. Friedman
4. Recipient of cor- pus in event of revocation	Jack L. Warner, if alive—if not alive, then his estate	Harry M. Warner, if alive—if not alive, then his estate	Albert Warner, if alive—if not alive, then his estate

The trustees of the respective trusts duly qualified and entered upon the performance of their duties as trustees under said Indentures, collected the income aris-

ing out of the securities constituting the trust corpora and paid the entire amount thereof, less commissions, to the respective beneficiaries named in said Indenture in accordance with the terms thereof (R. 33).

Questions Presented

The question in the case as presented by the petitioner (his brief p. 1) is predicated upon assumptions of fact so prejudicial to open-minded consideration of the case, that we take exception thereto. The petitioner avoids the force of the facts as stipulated and *creates* a structure upon which he expounds the law which would be applicable if the facts were assumed by him.

The primary issue in this case is (1) whether Albert Warner is the real grantor and settlor of a trust created by him consisting of securities owned by him and delivered to trustees named in a Trust Indenture executed and delivered by him in which he does not reserve the power to revoke, alter or amend the trust, either in himself alone or in conjunction with any person, or whether by virtue of a legal fiction Jack L. Warner, one of the beneficiaries may be treated as real grantor; and, (2) if the latter, whether such substituted grantor has such exclusive, absolute and unconditional power of recall and revocation, or dominion and control over the trust (ignoring adverse interests) that the payments of income from said trust by the trustees to the beneficiaries other than Jack L. Warner, constitute gifts by Jack subject to Gift Tax Law. Moreover, the trust was created on May 26th, 1932, before the incidence of the Gift Tax Law.

If petitioner fails to substantiate the fictitious situation which he has sought to create by the substitution of Jack as the grantor of the trust created by Albert, this being his major premise and the *sine-qua-non* of his success in this appeal,—his entire case falls.

On the other hand, if peradventure, the petitioner should prevail on the main issue that Jack L. Warner is in theory of law the grantor of Albert's trust, the petitioner must nevertheless establish—and the burden is upon him to do so—that the trust is of such a character as to make the income payments to the beneficiaries, transfers by Jack subject to Gift Tax.

POINT I

Albert Warner is the grantor and settlor of the trust created under Indenture of Trust executed by him, and he was the owner of the securities which he delivered to the trustees as the corpus of said trust. There is no justification for the assertion by the Commissioner that Jack L. Warner is the settlor.

The contention of the petitioner (pages 8 and 11 of his brief), is that “under the circumstances of this case” Jack L. Warner is “the real grantor” of the trust created by Albert Warner; that because *he*, Jack L. Warner, has “*retained* the power to revoke” (which, of course, he could not have *retained* unless it be admitted that he was the grantor) along with two other persons *having no adverse interest* (contrary to fact), he is subject to gift tax with respect to the income paid by the trustees to his divorced wife Irma and son, Jack M. Warner. To justify this argument he departs from the record, and extracts

from the Stipulation of Facts the fiction that Jack and not Albert is the real grantor of the trust. Proceeding upon this fictitious transposition of grantors,—indispensable to his entire case,—he indulges in an exposition of the legal consequences which would follow if Jack were the creator and grantor of the trust in question.

The facts as stipulated disprove the petitioner's allegations and reject his unwarranted conclusions.

The Trust Indenture under review sets up trust funds (a) for the benefit of Irma S. Warner, for life, with remainder over; (b) for the benefit of Jack M. Warner, son of Jack L. Warner, for life, with remainder over, and (c) for the benefit of Jack L. Warner for life, with remainder over.

The trustees are the grantor (Albert Warner), his two brothers, Harry M. and Jack L., Stanleigh P. Friedman and Central Hanover Bank and Trust Company. Their powers are narrowly limited. With respect to investments—paragraph 3 of the Indenture provides, that the trustees may continue to hold in the trust all property conveyed thereto, but in the event of a sale of all or any part thereof, the reinvestment of the proceeds is limited to United States obligations, to obligations of any State and to the obligations of a county or city only of the States of New York, New Jersey, Massachusetts, Pennsylvania, Ohio, Illinois, Maine, Rhode Island, Maryland and California. The power of sale, itself, may only be exercised upon direction of the three Warners acting "*jointly and unanimously*", so long as the three are living. It should be noted that upon the death of any one of the Warner brothers, Stanleigh P. Friedman automatically succeeds to the powers of the decedent, as representative of the beneficiaries. The exercise by the

trustees of any right of conversion or subscription or participation in a reorganization, consolidation, etc., requires similar joint and unanimous action. There is a marked absence of broad powers of investment and management in the trustees.

When Albert Warner, on June 4th, 1932, delivered \$2,000,000 of his securities to Central Hanover, he completely divested himself of all ownership, enjoyment, domination and control thereof. In the Trust Indenture executed and delivered simultaneously therewith, he reserved no power in himself alone or in conjunction with any person to alter, amend or revoke the trust.

The trustees who accepted the trust became legally bound to administer the trust in accordance with the terms and obligations of the Trust Indenture. This included a paramount duty on all of the trustees, including Albert Warner as a trustee of this particular trust, to see that the objectives of the trust were preserved regardless of whether he be considered grantor or "revocator." Albert, as trustee, holds a position of substance and has a vital obligation to protect the interest of his *cestuis*. (Cf. tabulation page 9.) All payments of income thereunder to the beneficiaries were in pursuance of legal obligations assumed by the trustees on June 4th, 1932. The beneficiaries were at all times thereafter in a position to insist upon fulfilment of those obligations by payment to them of the income to which they were entitled by virtue of a completed gift then made. (Cf. *Mead v. Commissioner*, 41 B.T.A. 424.)

There is a power of revocation set forth in the Indenture but it is vested not in the grantor, but in Harry M.

Warner, Stanleigh P. Friedman and Jack L. Warner and their survivors acting jointly and unanimously (Indenture, Paragraphs 5 and 11, R. 73, 79). Paragraph 5 of the Indenture among other things, states—

“In case this Indenture and the trusts hereby created shall be revoked in whole or in part, the property constituting the trust estate or so much thereof as to which the trust is revoked shall be transferred, assigned and delivered by the Trustees to Jack L. Warner or to the estate of Jack L. Warner, if he be deceased.”

In the event that a dispositive provision in favor of any beneficiary is revoked, that part as to which it may be revoked, by the very act of revocation, would pass to Jack L. Warner or his estate, freed from the trust.

There is no “possibility of reverter” in the grantor.

The grantor Albert Warner was advised by counsel to avoid the reservation, however remote, of any interest in the trust res, lest that remote interest, bring the trust res within the reckoning of his taxable estate upon death (R. 43). Albert accepted the advice of counsel to execute an Indenture which had been drawn deliberately with the foregoing purpose.

Harry M. Warner and Stanleigh P. Friedman are persons having substantial adverse interests.

The petitioner recognized however, that he could not rest his case solely upon the hypothesis that Jack L. Warner was the settlor of the trust and so proceeded with a further arbitrary assertion, indispensable to his theory, viz.: that Harry M. Warner and Stanleigh P. Friedman are persons having no substantial adverse interest in the disposition of the trust property or the in-

come therefrom. The evidence is to the contrary. The question of adverse interest is fully discussed in Point II (*infra*, p. 20 *et seq.*).

Substitution of Jack for Albert as grantor compels elimination of Jack as a "revocator".

Certain dominant purposes and reasons dictated the limitations imposed by the Trust Indenture upon each of the persons or groups of persons who were to assume the responsibilities assigned to them by that instrument. One of the most important restrictions carried out the intention that the grantor of the trust was not and could not be a "revocator". When the Commissioner finds it in the interest of the Revenue to indulge in the transposition of grantors (Jack for Albert) he does violence to both the intention and the action of the parties affected by the Indenture. The motive for his doing so is that, by substituting Jack for Albert as the grantor, he gains a grantor who is also a "revocator" and, in the absence of adverse interests, the statute would operate without help to give the Commissioner the result that he wishes.

It would be easier to condone the substitution of Jack for Albert as a grantor if the Commissioner carried his transposition to its logical conclusion and substituted Albert for Jack as a "revocator". We may only conclude that he stops short in the logical process because he realizes that the substitution of Albert for Jack as a "revocator" would defeat his purpose, although the intention to maintain irrevocability by the grantor would be respected by so doing.

Petitioner's contention for substitution of grantors is grounded upon the case of *Allen S. Lehman*, 39 B.T.A. 17, affirmed (C.C.A. 2, 1940), 109 F. (2d) 99.

In that case the decedent Harold Lehman and his brother owned *undivided* interests in an account containing securities. Each created inter vivos trusts for the life of the other, with absolute power in each beneficiary to withdraw \$150,000 before a certain date. Harold died without having exercised this power and the amount as to which it could have been exercised was included in his taxable estate.

It is significant in the *Lehman* case that each grantor vested in the beneficiary, his brother, the *absolute* and *exclusive* right to invade the corpora of the trusts for his own benefit to the extent of \$150,000, without consultation with or consent of the other, or the trustees or any person whatsoever. The two transfers occurred under such circumstances that, when completed, each of the transferors was in no different position with respect to \$150,000 than if he had taken \$150,000 of his own money and put it where he could lay his hands on it whenever he wanted it. On these facts, no one can be surprised that the Board and Circuit Court of Appeals included \$150,000 in the taxable estate of the decedent.

In *Commissioner v. Dravo* (C.C.A. 3), 119 F. (2d) 97, the Court affirming the Board comments on the *Lehman* case.

In the *Dravo* case two brothers and their wives executed reciprocal trusts, each brother for his wife, and each wife for her husband. There was a provision in each trust whereby the trustees could in their discretion advance portions of the principal of the wife's trust to her husband, and portions of the principal of the husband's trust to his wife. The Commissioner urged that the corpora of these trusts were taxable for estate tax to the estates of the two husbands under the authority of the *Lehman* case.

The Circuit Court of Appeals distinguished the *Lehman* case, and noted especially "that *there* the life beneficiary was given an unqualified power to invade the corpus of the trust created by his brother."

The Board of Tax Appeals, in 40 B.T.A. 309 had previously denied the contention of the Commissioner in the following language at page 322:

"We do not think we have the same situation here as we had in the *Lehman* case. There the decedent gave his brother Allan the absolute and unconditional right to withdraw the \$150,000 in exchange for similar rights of the decedent in the trust created by Allan. No such absolute and unconditional rights are present in the instant proceedings. Neither of the decedents here could withdraw any of the principal of his wife's trust at his pleasure, nor could either wife withdraw any of the principal of her husband's trust at her pleasure. Neither Francis nor Ralph ever received any part of the principal deposited under the deeds of their respective wives. Any payment of principal under article second, section 1, of any of the four trusts could be made only in discretion of the trustees, and if they abused this discretion they would render themselves liable to any remainderman whose interest would thereby be adversely affected. Cf. *Higgins v. White*, 93 Fed. (2d) 357. We hold that no part of the corpora of the four trusts is includable in the respective gross estates of the decedents by reason of the provision contained in article second, section 1, of all four trusts whereby the trustees could in their discretion advance portions of the principal of the wife's trust to her husband and vice versa."

To support his insistence that the case at Bar is factually similar to the *Lehman* case, petitioner's counsel (pp. 4, 12 of his brief) quotes a statement by the Board member in this case, which the petitioner calls a finding of fact. The quotation of itself is dictum and only indicates the necessity for an exhaustive examination of all of the facts and circumstances before reaching a conclusion on whether the trusts as established should be respected.* The necessity for such examination of the attendant circumstances has nowhere been expressed more forcefully than by the Circuit Court of Appeals in the *Dravo* case.

It has been stipulated and agreed that the respondent and his brothers were motivated to set up the trusts so that the corpora should be secured from the hazards of the business, *secured against the action of the brothers themselves and each other*, and secured for the protection of their wives and children. To accomplish this, they deliberately and irrevocably integrated into the situation a trusted third person, their friend and counsellor, without whose consent no one of the trusts could be revoked. It was his role and obligation to represent the wives and children, to provide that in the event of the death of one of the brothers his widow and children would not be subject to the influence of the *remaining two brothers alone*, because each brother had his own idea of policy, *and was not willing to subject his estate to different philosophies of investment of the surviving brothers alone*. (R. 42, 43 and 44). He would veto any action adversely affecting the interest of the wives and children.

* The two cases cited by petitioner at pages 14 and 15 of his brief, *Chase National Bank v. United States*, 278 U. S. 327, and *Helvering v. LeGierse*, 312 U. S. 531, are excellent examples of the necessity for this approach.

There is, therefore, no unconditional and absolute right in the respondent in the instant proceeding to revoke, alter or amend the Trust Indenture at pleasure. To argue that there is, requires reconstruction of the premises in defiance of the intent of the parties and the language of the trust instrument, and substitution for these of a fiction compounded of implication, deduction, speculation and unsupported reasoning.

POINT II

The same hypotheses upon which petitioner grounds the substitution of Jack for Albert as grantor, lead to the ultimate conclusion that the respondent did not have such power over the income that it might be treated as his gift when paid to the beneficiary.

A

Admitting *arguendo* that Petitioner succeeds in his contention that Jack L. Warner is the real grantor, and successfully avoids the logical substitution of Albert for Jack as "revocator," even then Jack is not possessed of power or control which would enable him to invade the corpus or divert the income of the trust without the consent of persons having a substantial adverse interest.

To support his main argument, petitioner has deduced from the record a recital of facts necessary to his contention. Such assumptions demand reliance upon the existence of all of the trusts and a fictitious relationship between each and every one of the grantors, trustees and "revocators". It is necessary to meet his suggestions concerning adverse interest only if his major premise is true. We therefore decry his attempt to confine his discussion of adverse interest to an analysis of the single trust created by Albert.

Even though Petitioner prevails in his argument that Jack L. Warner must be *assumed* to be the grantor of the trust in question, to complete his case he must establish that neither Harry M. Warner nor Stanleigh P. Friedman has a substantial adverse interest. This he attempts to do at pages 29-32 of his brief. In the first place he restrictively characterizes Friedman as "taxpayer's counsel" and then indulges in the speculation that if Friedman would not follow the taxpayer's wishes and repudiate his fiduciary obligations to his *cestuis que trust*, "it would be difficult to find anyone whose interests would not be considered adverse. * * * There was thus no basis for claiming that Friedman would not be amenable to the taxpayer's wishes".

On page 32 of his brief, Petitioner admits that "the question is a practical one and cannot be decided in a legal vacuum". (Citing *Fulham v. Commissioner*, 110 F. (2d) 916 (C. C. A. 1st).) We accept this test. Although concededly a practical question the Petitioner proceeds to decide it without reference to the facts.*

First—as to Friedman: he ignores the fact that Friedman had the confidence of *all* members of the Warner family, including wives and children: he impeaches Friedman's loyalty and responsibility to Harry and Albert, and bases his case on the conjecture that Friedman as "taxpayer's counsel" is subservient to the will of Jack. On the facts this conclusion is inconceivable. Friedman is the only person occupying the position of both trustee and "revocator" in all of the trusts; he cannot be removed either as trustee or as "revocator", and the record is clear

* *Reinecke v. Smith*, 289 U. S. 172, and *Morton v. Commissioner*, 109 F. (2d) 47, give no real help in the solution of the problems arising out of the facts in this case. These cases as well as *Commissioner v. Caspersen*, 119 F. (2d) 94, and other cases prosecuted by the Commissioner to prevent tax avoidance by use of trusts, have been decided on the facts of each case, as required by the Supreme Court of the United States in *Helvering v. Clifford*, 309 U. S. 331.

on the reason for this. He is completely integrated into the administration of the several trusts and his interest and legal duty is to see that each trust is properly administered.

A necessary correction to the footnote on page 32, of Petitioner's brief, viz., adding Friedman as one of the persons having the power to amend or revoke in addition to Harry M. Warner and Albert Warner,—serves to contradict the statement on page 29 of Petitioner's brief, that "there was no basis for claiming that Friedman would not be amenable to the taxpayer's wishes". The footnote concedes that the "taxpayer" (and therefore any other person having the power to revoke, including Friedman) could refuse to cooperate and in this way could exert a pressure on the other grantors. This is tantamount to admitting that Friedman, being one of the persons having power to revoke has a substantial adverse interest.

The Petitioner has next directed his fire upon the interest of Harry M. Warner under the Albert Warner trust. If Albert is the actual grantor, it is unnecessary to go into the question of adverse interest in Harry. Discussion of Harry's position is only required by acceptance of Jack as the substituted grantor for Albert. On that hypothesis, what is Harry's relation to Albert's trust?

It can no longer be said that the words "substantial adverse interest" are used in the restrictive sense indicated by numerous cases dealing with the general law of trusts. These words will be given the significance required (at least in Federal tax cases) by the real powers, privileges and obligations of the trustee or beneficiary involved. (See *Commissioner v. Chamberlain*, 121 F. (2d) 765.

In *Commissioner v. Betts*, 123 F. (2d) 534, the contention of the Commissioner was that a mother and wife of the grantor, who were beneficiaries of the trust and whose consent must be had to revoke the trust, were not persons having a "substantial adverse interest". The Circuit Court of Appeals disagreed with the Commissioner and used this language (p. 539):

"In this situation, though the beneficiaries are closely related to the grantor, he has given them certain rights which he was not bound to give them, certain income which he was not bound to give them; and over this he has surrendered control. It may be that because of family affection they might consent to a revocation, but that fact does not of itself destroy their quality of adverse holding protected by the statute. What Congress had in mind evidently was such a person as has a vested right under a trust agreement to insist upon its performance and cannot be compelled to surrender the same."

Harry had the right under the trust agreement "to insist upon its performance and cannot be compelled to surrender the same". It is both unfair and inconsistent with the petitioner's hypotheses, to define Harry's rights and declare them not adverse, because they are fixed by the terms of Albert's trust alone.

Petitioner's counsel eventually comes to acceptance of the more enlightened view of "substantial adverse interest" as defined in the *Betts* case. In his footnote at the bottom of page 32, he says "the taxpayer could refuse to co-operate and in this way could exert a pressure on Albert Warner to prevent revocation of the trust for the benefit of Harry Warner". Accepting this at face value, each of the three brothers had substantial interests adverse to each other.

B

Since there was no power in the respondent to obtain or control the payments of income and since the trustees were under the duty to make such payments to the beneficiaries, said beneficiaries received such payments as taxable income and not as gifts.

The instant case, decided by the Board of Tax Appeals subsequent to the decision of the Supreme Court in the *Clifford* case, reaffirmed the principle adopted by the Board in *Commissioner v. Mead*, 41 B.T.A. 424.

That the case at bar is apposite to the circumstances existing in the *Mead* case, can best be demonstrated by the following language of the opinion in the *Mead* case at page 428:

“The instrument creating the trust entitled the beneficiary to the net income of the property held in trust during her lifetime or until the donor exercised his power to change beneficiaries. She thus became the owner of an equitable interest in the corpus of the trust property, subject to being divested by the happening of a subsequent event, Cf. *Blair v. Commissioner*, 300 U. S. 5; *Brown v. Fletcher*, 235 U. S. 589; *Irwin v. Gavit*, 268 U. S. 161. By virtue of this interest in the corpus of the trust she was entitled to enforce the trust, to have a breach of trust enjoined, and to require the net income to be paid over to her by the trustee. The interest was present property, alienable like any other in the absence of a valid restraint upon alienation. *Blair v. Commissioner*, *supra*. Since the net income was currently distributable to her, it became her property within the meaning of the taxing statutes at the time of its receipt by the trustee. *United States v. Arnold*, 89 Fed. (2d) 246. The reserved power of the donor did not affect the quantum of her interest. It only made its duration contingent upon the exercise of the power by the decedent to change beneficiaries.”

Both the *Mead* case and the case at bar must be distinguished from those cases in which the transfer under consideration was merely an assignment of future income as in the case of *Corliss v. Bowers*, 281 U. S. 376. In that case the donor was deemed to have had control of the income to give away in such parts, estates and terms, as he wished, to rescind, retract or revoke such assignments, in whole or in part, and to substitute other persons as beneficiaries, without limitation. In cases like the *Blair* case and the instant case, the donor had no right, power or control over the income. He did have the power to terminate the trust and revest the corpus in himself, but this is not the equivalent of control over the disposition of the income such as was passed upon in *Corliss v. Bowers*.

It must be obvious, as it was to the court in *Stuart v. Commissioner* (C. C. A. 7, December 19, 1941), that "the recapture of the corpora of the trusts by petitioner [respondent] would be by virtue of the future exercise of his influence over the other trustees, and not by virtue of any right which he reserved or failed to grant at the time of his declaration * * *".

In the *Blair* case and in the instant case and in *Harrison v. Schaffner*, 312 U. S. 579, the beneficiaries were vested with equitable estates and income which was paid to them flowed from their equitable interest in the corpus of the trust estate.

Distribution was in satisfaction of the obligation of the trustee, and not a gift of income to the beneficiary by the donor of the trust at the time of distribution. It was reported as income by the beneficiaries and they paid income tax thereon.

We disagree with the suggestion of Roswell Magill appearing in the note on page 21 of Petitioner's brief that the reasoning of the Board in the *Mead* case seems inadequate. In the *Mead* case, distinction is drawn, between

equitable estates vested in beneficiaries who receive the income because of their equitable interest in the corpus (cf. *Blair v. Commissioner*), and assignments of future income from trusts (cf. *Corliss v. Bowers*).

The integration of income tax and gift tax impositions was refused by the Board in *Buck v. Commissioner*, 41 B.T.A. 99,* and in the *Mead* case. When an opportunity came to compel such integration, the Supreme Court of the United States in *Harrison v. Schaffner*, declined to go so far as some of the text writers expected and did not modify in any respect the rule laid down in the *Blair* case. On the contrary, the Supreme Court established a positive distinction which must be respected in the examination of income tax cases arising under Section 22 (a), I.R.C. as compared with those controlled by other provisions of the taxing statutes. The court is careful to point out in *Harrison v. Schaffner* that the decisions in the *Clifford*, *Horst* and *Eubank* cases all turned on the fact that skillfully devised anticipatory arrangements made it possible for the grantor, in the circumstances of those cases, to exercise his power to control the income and to enjoy the benefits thereof.

Careful analysis of these cases establishes the propriety of the decision in the *Mead* case. The presence of circumstances which might justify income taxation of a grantor because he controls the income, or on the theory that his obligation is satisfied, or because he receives a "non-material satisfaction" (cf. *Whiteley v. Commissioner*, 120 F. (2d) 782), any one of which might be sufficient to support the imposition, will not command a further imposition upon the passage of the income to the trust beneficiary *in the absence of an effective statute on May 26, 1932*. There is no such legislation and this is an

* The Circuit Court of Appeals in *Commissioner v. Buck*, 120 F. (2d) 775, reversing the Board, applied the *Clifford* rule of Section 22 (a) I.R.C., distinguished the *Blair* case, but did not even refer to the Sanford and other gift tax cases.

answer to the rhetorical question propounded by the Petitioner at page 21 of his brief. Although the Supreme Court in *Burnett v. Guggenheim* says, in effect, that Congressional legislation is unnecessary to support a fact (of transfer) the Board of Tax Appeals and the Circuit Court of Appeals for the First Circuit in *Commissioner v. Prouty*, 115 F. (2d) 331, were well advised in their refusal to accept the suggestion of the Government that the repeal of Section 501 (c) necessarily allowed the law of its own motion to step in and impose a tax on a payment by a trustee to a beneficiary which flowed from the complete divestment of the corpus prior to passage of the gift tax law.

There is another very significant distinction between Section 22 (a) income tax cases controlled by the rule of the *Clifford* and related cases, and gift tax cases controlled by the rule of the *Mead* and *Warner* decisions of the Board. This has to do with the period of time during which the grantor seeks to divorce himself from control over the income. The *Clifford* case has been distinguished in numerous subsequent cases and the rule of the *Clifford* case has been narrowed not only by Circuit Courts but with the approval of the Supreme Court.*

The cases which have usually been held to fall outside of the *Clifford* rule are those in which the opportunity for the grantor to repossess or enjoy the benefit of the income was remote, either in time or because the contingencies upon which such income would be enjoyed were not likely to occur.

In no case has the grantor been taxed on the income where the power to repossess the income required the exercise of revocation as to corpus or termination of the trust upon such remote possibilities as those existing in this case.

* *Helvering v. Achelis*, 112 F. (2d) 929 (C. C. A. 2d, 1940);
Commissioner v. Branch, 114 F. (2d) 985 (C. C. A. 1st, 1940);
Helvering v. Palmer, 115 F. (2d) 368 (C. C. A. 2d, 1940);
Commissioner v. Chamberlain, 121 F. (2d) 765 (C. C. A. 2nd, 1941);
Jones v. Norris, 122 F. (2d) 6 (C. C. A. 10th, 1941);
Commissioner v. Jonas, 122 F. (2d) 169 (C. C. A. 2nd, 1941).

Distinction must again be drawn between the application of the rule laid down in cases referring to corpus, and the extension of the rule to cover possible application thereof to annual accruals of income in the hands of the trustees for the account of the beneficiaries. The distinction is emphasized by the reasoning of the Board in the *Prouty* case, 41 B.T.A. 274, 278, where it was stated "If there had been a similar taxing statute during all of those prior years, these trusts would not have escaped tax in some prior year".

C

The Stipulation definitely establishes that Albert completed the transfer of his property in trust prior to the effective date of the Gift Tax Title of the Revenue Act of 1932. The transaction was, both in form and in fact, so complete and absolute that no gift tax may be claimed upon the payment of any income arising from said trust.

If the trust here in question had been created on July 1, 1932, subsequent to the enactment of the Revenue Act of 1932, a gift tax would have been imposed upon the transfer of the corpus of the trust and no one could thereafter have suggested that the income flowing therefrom would be subject to gift tax.

Completed gift of corpus carries with it gift of future income. Can it be said that in the case of a completed gift of the corpus *prior* to June 6, 1932, the payments of subsequently accruing income would be subject to gift tax?

The case of *In re Hoyt's Estate*, 149 N. Y. Supp. 91 (Surrogate's Ct. N. Y. County, 1914), appearing in the footnote of page 23 of Petitioner's brief, has been in effect overruled by the Court of Appeals of New York in the important case of *Matter of Schmidlapp*, 236 N. Y.

278 (1923). In this case Judge Cardozo writing for the Court says at page 284:

“The distinction is between a gift which clothes the donee with a right of present enjoyment, though subject to revocation at the will of the donor, and one where the donor reserves to himself not only the power to revoke, but also enjoyment during life, so that no beneficial right enforceable against him exists until his death. In the one class of cases, the law in force at the delivery of the deed, and in the other the law in force at death, is the measure of the right to tax.”

Applying this principle here, our case is clear. When the trust of Albert Warner was created on May 26th, 1932, no right of present enjoyment in the income was reserved by the grantor. The beneficiaries were entitled to receive the income from the trustees. In this situation the law in force at May 26, 1932, is the controlling law and it cannot be suggested that the law in force at the time when the income was paid, may be invoked to support a claim that the gift was not complete on May 26, 1932.

The Petitioner would have it appear that when the Trust was created on May 26, 1932, there was some reservation of power which would support the imposition of a gift tax when subsequently accruing income was paid to the beneficiaries.

Prior to enactment of the Gift Tax Act of 1924, Guggenheim created a trust in which he reserved a power of revocation. Thereafter, and subsequent to passage of the Act, he annulled the power of revocation. The Commissioner claimed that annulment of the power of revocation completed what had previously been an inchoate gift, and the Supreme Court supported the Com-

missioner in this contention. (*Burnet v. Guggenheim*, 288 U. S. 280.)

Referring to Section 501 (c) of the Revenue Act of 1932 repealed by Section 511 of the Revenue Act of 1934, Mr. Justice Cardozo, speaking for the court, said that Section 501 (c) had been merely “declaratory of the law [Gift Tax] which Congress meant to establish in 1924”. The incorporation of Article 1, Regulations 67 (1924), into the statutory language of the Revenue Act of 1932, the Court said “will give the rule for *later* transfers.” (Italics ours.)

The rule laid down in *Burnet v. Guggenheim*, was of no effect between January 1, 1926, the effective date of repeal of the Revenue Act of 1924 and June 6, 1932, the effective date of the Revenue Act of 1932.

Subsequently enacted statutes and interpretations thereof cannot be invoked retroactively to support a tax in the instant case upon a transfer which was in all respects completed before the incidence of the taxing act. (*Schwab v. Doyle*, 258 U. S. 529; *Hasset v. Welch*, 303 U. S. 303.)

Retroactivity of statutes and regulations has been permitted and approved by the courts in connection with income taxes. Income tax is an excise on the privilege of receiving and enjoying income computed on an *annual* basis. Estate tax, and gift tax which is deemed to be in *pari materia*, has not been imposed upon a transfer antedating the incidence of the taxing statute. Regulations 79, issued under the Revenue Act of 1932, gave approval to the principle that a completed transfer of corpus carried with it a completed gift of income thereafter flowing from such corpus. The regulations so worded were contained in Article 3, which was printed in the appendix attached to Petitioner's brief herein. These regulations were revised in 1936 and Petitioner, realizing that the language

of the revised regulation lays a better foundation for the test that he would now apply, has sought to obtain the privilege of filing a new appendix to his brief containing Article 3 as revised in 1936, which he asks be substituted for that originally "filed in error". Comparison of the regulations of 1932 with those of 1936 serves to emphasize a change in thinking by the Commissioner, which now leads him to invoke a new rule of interpretation in *income tax* cases to support his attempted retroactive application of the gift tax statute. It was only after Sections 166 and 167 as amended by the Revenue Act of 1932 were introduced into the basic income tax law, that the Government sought and the courts gave approval to an enlarged application of Section 22 (a) I.R.C. (Section 213 (a) Revenue Acts of 1924 and 1926). Re-enactment of Section 22 (a) in substantially the same form as Section 213 (a) of the prior acts, accompanied by amendment of Sections 166 and 167 in the Revenue Act of 1932, might justify the courts in assuming Congressional intention to tax income of trusts as the income of the grantor where the grantor had always dominated and controlled the income, but this principle of construction should not be invoked to justify imposition of gift tax on income passing under a trust established prior to the Revenue Act of 1932.

If the established rule of law be applied to the facts, we have a completed transaction and no problem of taxation. To avoid this consequence, the Commissioner substitutes Jack for Albert as grantor and creates a factual fiction to justify the imposition of a different rule of law garnered from *subsequent* statutes and their interpretation. Thereby, the Commissioner arrogates to himself authority which the courts have denied even to Congress. "There are, however, limits to the power of Congress to create a fictitious status under the guise of

supposed necessity". *Helvering v. City Bank Farmers Loan & Trust Co.*, 296 U. S. 85.

As a matter of fact, the payments of income to the beneficiaries which "were treated for Federal income tax purposes as the taxable income of said beneficiaries" (R. 36) were paid over to the beneficiaries by the trustees pursuant to their legal obligation so to do.

In *Blair v. Commissioner*, 300 U. S. 5, at page 13, the Supreme Court said:

"By virtue of that interest he was entitled to enforce the trust, to have a breach of trust enjoined and to obtain redress in case of breach. The interest was present property alienable like any other, in the absence of a valid restraint upon alienation. *Commissioner of Internal Revenue v. Field* (C.C.A. 2nd), 42 F. (2d) 820, 822; *Shanley v. Bowers* (C.C.A. 2d), 81 F. (2d) 13, 15.

* * * * *

The assignment of the beneficial interest is not the assignment of a chose in action but of the 'right, title and estate in and to property'".

Conclusion.

The petitioner here is appealing for equitable reformation of a factual situation.

"A court of equity has power to control the administration of a trust so that it will accord with the purposes of the grantor. A discretion lodged in a trustee is rarely, if ever, to be regarded as a permit to act arbitrarily. Such discretion should be confined to the exercise of judgment not unreasonable in the light of the purposes of the trust and of the circumstances in which it is sought to be exercised. The power of the court exists solely for the protec-

tion of the right of the grantor and the beneficiaries.”

Stuart v. Commissioner, C. C. A. 7, December 19, 1941. (Affirming in part and reversing in part 42 B. T. A. 1421.) (See also Restatement of Law of Trusts, Sec. 170.)

Congress did not intend and the courts have not implied a Congressional purpose to alter declared trust objectives, unless it be clearly shown that the grantors had in substance retained the trust *res* or continued to hold powers over the income which would make the income subject to the beneficial use of the grantor. After all this is a simple factual case. Nothing in this record would justify this court in applying abnormal rules to the trust here involved and changing the tax consequences attaching thereto. The Board of Tax Appeals has so found and should be affirmed.

January, 1942.

Respectfully submitted,

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5 See 10319
United States

Circuit Court of Appeals

For the Ninth Circuit.

VIRGINIA DAVIS HARTMAN and MAR-
GARET DAVIS RICHARDSON,

Appellant,

VS.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

FILED

DEC - 9 1941

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in
and for the Northern District of California,
Southern Division.

VIRGINIA DAVIS HARTMAN and
MARGARET DAVIS RICHARDSON,
Plaintiffs,

vs.

HAROLD F. DAVIS, ARTHUR A. DOLE,
STEWART ESTATE COMPANY, a corpora-
tion, C. F. HUMPHREY, SAMUEL PLATT,
JOHN S. SINAI, SIERRA CONSOLI-
DATED MINES, INC., a corporation, BANK
OF AMERICA NATIONAL TRUST & SAV-
INGS ASSOCIATION, a national banking
association, LUTHER ELKINS, RICHARD
ROE, WILLIAM BLACK, MARY BOE,
JANE DOE and SUSAN VOE,
Defendants.

Civil No. 21021-R.

SECOND AMENDED COMPLAINT TO ESTABLISH A TRUST AND FOR AN ACCOUNTING

Now come Virginia Davis Hartman and Margaret Davis Richardson, the above named plaintiffs, and by leave of [1*] Court first had and obtained, file this their Second amended complaint herein, and in this their first count and separate cause of action, for cause of action allege:

I.

That the defendant Stewart Estate Company is now and during all of the times herein mentioned was a corporation.

II.

That the defendant Sierra Consolidated Mines Inc., is now and during all of the times herein mentioned was a corporation.

III.

That the true name and identity of the defendant John Doe, is Luther Elkins. That the defendants, Richard Roe, William Black, Mary Boe, Jane Doe and Susan Voe are fictitious defendants, the true names of whom are unknown to the plaintiffs, and said plaintiffs pray in this respect that when said true names be ascertained they be by permission of this Honorable Court permitted to substitute said true names for said fictitious names.

*Page numbering appearing at foot of page of original certified Transcript of Record.

IV.

That the defendant Bank of America National Trust and Savings Association is now and during all of the times mentioned in this complaint, was a national banking corporation organized and existing under and by virtue of the laws of the United States of America.

V.

That Martina Maxine Dole died in the County of San Mateo, State of California, on or about the 3rd day of February, 1934; that the said Martina Maxine Dole was at the time of her said death a resident of said County of San Mateo, State aforesaid, and left an estate therein consisting of both real and personal property. That the said Martina Maxine Dole died intestate, that is to say, that the said Martina Maxine Dole failed to [2] leave surviving her any valid last will and testament disposing of such property that she died possessed of. That the said Martina Maxine Dole left surviving her as her sole heirs at law your plaintiff, Virginia Davis Hartman, a sister of said deceased, your plaintiff, Margaret Davis Richardson, a sister of said deceased, the defendant Harold F. Davis, a brother of said deceased, and the defendant Arthur A. Dole, the surviving husband of said deceased.

VI.

That subsequent to the death of the said Martina Maxine Dole, deceased, there was filed in the Superior Court of the State of California, in and for the County of San Mateo, a petition for Letters

of Administration, numbered therein 6432 probate; that subsequent thereto and after due and proper proceedings had pursuant to the law and the statute in such instances made and provided for, to-wit on or about the 11th day of June, 1934, the said last named Court by an order duly given and made appointed the defendant Bank of America National Trust & Savings Association, a national banking corporation as administrator of the said estate of the said Martina Maxine Dole, deceased; that the said defendant Bank of America National Trust & Savings Association, a national banking corporation, thereupon immediately qualified and letters of Administration were issued to it by the Clerk of said last named Court over the seal thereof, that thereafter and after due and proper proceedings had pursuant to the statute in such instances made and provided for, and on or about the 30th day of November, 1936, the said last named Court by an order duly given and made, decreed distribution to the said heirs at law of the said Martina Maxine Dole, deceased, and in said decree of distribution said last named Court adjudicated that the said plaintiff, Virginia Davis Hartman, was a sister of said deceased, and as such entitled to [3] an undivided one-sixth interest in all property belonging to said deceased and likewise in all property not known or discovered at said time, and that the said Court further decreed that the said defendant, Harold F. Davis, was a brother of said deceased, and as such entitled to an undivided one-sixth interest in all property belonging to said deceased and

likewise in all property not known or discovered at said time, and that said Court further decreed that the said defendant Arthur A. Dole was the surviving husband of said deceased, and as such entitled to an undivided one-half interest in all property belonging to said deceased and likewise in all property not known or discovered at said time, and that said property was distributed to said last named persons in accordance with the ratio and proportion of their respective ownership in and to said property belonging to said deceased, as aforesaid.

VII.

That plaintiffs are informed and believe and upon such information and belief allege that the defendants, Stewart Estate Company, a corporation, and C. F. Humphrey, claim some right, title, interest in or lien upon the share and portion of the said property of said deceased distributed to and belonging to the defendant Arthur A. Dole by reason of certain instruments, conveyances or assignments executed by the said defendant Arthur A. Dole to the said defendants Stewart Estate Company, a corporation, and/or the defendant, C. F. Humphrey.

[4]

VIII.

That the said plaintiffs are informed and believe and upon such information and belief allege that the defendants, Richard Roe, William Black, Mary Boe, Jane Doe and Susan Voe claim some right, title, interest in or lien upon the said property left by said deceased, Martina Maxine Dole, but in this

respect said plaintiffs allege that said claim or claims on behalf of said last named defendants are without merit and in any event subordinate to the claims of the said plaintiffs in and to their said respective shares of the said property belonging to the said deceased, Martina Maxine Dole, as aforesaid.

IX.

That plaintiffs are informed and believe and upon such information and belief allege that at all times mentioned in this complaint the defendants Samuel Platt and John S. Sinai were and are now attorneys-at-law engaged in the general practice of the profession of law as co-partners in the City of Reno, State of Nevada, under the firm name and style of Platt and Sinai.

X.

That the defendants C. F. Humphrey and Luther Elkins are now and during all of the times mentioned in this complaint, were attorneys-at-law duly licensed as such under the laws of the State of California. That the said defendants C. F. Humphrey and Luther Elkins were the attorneys of record for, and represented the Bank of America, a national banking [5] corporation, as special administrator of the Estate of Martina Maxine Dole, deceased. That the said defendants C. F. Humphrey and Luther Elkins also were the attorneys for and represented the defendant Arthur A. Dole and the plaintiffs Virginia Davis Hartman and Margaret Davis Richardson, heirs of the said Martina Maxine

Dole in the matter of the estate of the said Martina Maxine Dole to the extent as will hereinafter be more specifically referred to and alleged.

XI.

That plaintiffs are informed and believe and upon such information and belief allege that at the time of the death of the said Martina Maxine Dole, deceased, the said defendants Samuel Platt and John S. Sinai were, and for a long time prior thereto had been the attorneys and counsellors-at-law for the said Martina Maxine Dole; that by reason of said relationship of attorney and client between the said defendants Samuel Platt and John S. Sinai, and the said Martina Maxine Dole, deceased, a relationship of trust and confidence existed between the said last named defendants and the said Martina Maxine Dole, deceased, at the time of the death of the said Martina Maxine Dole, deceased, and for more than eighteen months prior thereto.

XII.

That plaintiffs are informed and believe and upon such information and belief allege that on or about the 11th day [6] of May, 1933, the said defendant, John S. Sinai, on behalf of himself and his said partner, the said defendant Samuel Platt, notified the said Martina Maxine Dole and her then husband, the said defendant Arthur A. Dole, substantially as follows, to-wit:

(a) That Silverado and Kentuck mining property situate in Mono County, State of California,

some twenty miles northerly from the town of Bridgeport in said County, and consisting of several lode claims, together with a hydro-electric power plant and power line, a mill, machinery, tools equipment, buildings, water rights and other property, was advertised for sale and would be sold at a Receiver's sale thereof on or about the 20th day of May, 1933;

(b) That the machinery pertaining to said mining property and constituting a part of said property to be sold had cost in excess of Three Hundred thousand (\$300,000.00) Dollars in cash and was then in good condition;

(c) That he, the said defendant, John S. Sinai, had conferred with his friend, one D. C. McKay, the aforesaid Receiver, who would make the aforesaid sale, and that he, the said defendant, John S. Sinai, was led to believe from such conferences and conversations with the said D. C. McKay that by reason of the said prevailing money stringency and consequent lack of available buyers, all of said mining property would be sold at said sale thereof for approximately Eighteen thousand five hundred (\$18,500.00) Dollars;

(d) That the said defendant John S. Sinai recommended most strongly that the said Martina Maxine Dole should permit said defendant John S. Sinai and the said defendant Samuel Platt to put in a bid at said Receiver's sale for and on behalf of the said Martina Maxine Dole and that said last named defendants be permitted by the said Martina Maxine Dole [7] as her representatives and attor-

neys to use their best endeavors to purchase all of the aforesaid property for the use and benefit of the said Martina Maxine Dole provided it could be purchased for a sum not to exceed Twenty-five thousand (\$25,000.00) Dollars.

(e) That the said defendant John S. Sinai requested that the said Martina Maxine Dole send to said last named defendant immediately the sum of Twenty-five hundred (\$2500.00) Dollars in cash to be used by him in paying a ten percent installment of the sale price of said property at the time of making said bid in the event that said bid of the said defendants Samuel Platt and John S. Sinai for and on behalf of the said Martina Maxine Dole was accepted and if the said last named defendants should be the successful bidders for said property at said sale; that the said defendant John S. Sinai in this respect stated to the said Martina Maxine Dole that if the said sum of Twenty-five hundred (\$2500.00) Dollars was sent to said last named defendant by the said Martina Maxine Dole for the purposes, as aforesaid, it would not be necessary for the said Martina Maxine Dole to send him any additional moneys with which to complete the purchase price of the said property as the said defendant John S. Sinai would be able to obtain the remaining nine-tenths of the sale price of the said property from a re-sale for the said Martina Maxine Dole of certain of the machinery or certain water rights which constituted part of the said mining property, as aforesaid.

XIII.

That plaintiffs are informed and believe and upon such information and belief allege that at the time of making the aforesaid representations to the said Martina Maxine Dole the said defendant John S. Sinai delivered to the said Martina [8] Maxine Dole an itemized inventory of the real and personal property above referred to, together with a printed notice of said Receiver's sale, together with a letter from the said D. C. McKay, the said Receiver who would make said sale, as aforesaid, addressed to the said defendant John S. Sinai, wherein the said D. C. McKay advised the said defendant John S. Sinai that the purchase of said property at the aforesaid Receiver's sale thereof would be a very fine investment for the said John S. Sinai or any friend or client of his as said machinery on said property alone could be readily sold within a short time after the sale for at least Thirty thousand (\$30,000.00) Dollars cash, which would be about ten percent of the original cost of the said machinery as aforesaid.

XIV.

That plaintiffs are informed and believe and upon such information and belief allege that at the time that the said defendant John S. Sinai counselled and advised the said Martina Maxine Dole, as aforesaid, to become a purchaser at said Receiver's sale and to permit the said defendants John S. Sinai and Samuel Platt to act for her as her agents and representatives in the purchase of the said property at said sale, as aforesaid, the said defendants John

S. Sinai and Samuel Platt knew that the said Martina Maxine Dole had a sum in excess of Twenty-five hundred (\$2500.00) Dollars in cash for an investment and was at said time looking for an investment in a gold or silver mine.

XV.

That plaintiffs are informed and believe and upon such information and belief allege that thereafter and between the 11th day of May and the 15th day of May in the year 1933, the said defendant John S. Sinai communicated with the said Martina Maxine Dole and her then husband, the said defendant Arthur A. Dole, by telephone between the office of the said defendants John S. Sinai and Samuel Platt situate in the said City of Reno, State of Nevada, as [9] aforesaid, and the residence of the said Martina Maxine Dole situate in the said County of San Mateo, State of California, and in said conversations the said defendant John S. Sinai discussed the advisability of purchasing the aforesaid mining property at the aforesaid approaching Receiver's sale, and that he, the said defendant John S. Sinai, repeatedly urged upon the said Martina Maxine Dole to authorize him and the said defendant Samuel Platt to purchase said property for her at said sale and to send the said defendant John S. Sinai the said sum of Twenty-five hundred (\$2500.00) Dollars for the use and purposes herein set forth in connection with said sale of said property; that on or about the 14th day of May, 1933, the said Martina Maxine Dole informed the said defendant

John S. Sinai that she had decided to accept his recommendation and advice regarding the making of said bid for said mining property at said Receiver's sale, and that she did thereupon authorize and direct the said defendants John S. Sinai and Samuel Platt to bid in said property for her at said Receiver's sale at a price not to exceed Twenty-five thousand (\$25,000.00) Dollars, and that the said Martina Maxine Dole did thereupon cause to be transmitted to the said defendants John S. Sinai and Samuel Platt the sum of Twenty-five hundred (\$2500.00) Dollars for the purpose and use hereinbefore set forth.

XVI.

That plaintiffs have been informed and believe and upon such information and belief allege that on or about the 20th day of May, 1933, the said mining property was offered for sale at said Receiver's sale thereof and at said sale the said defendants John S. Sinai and Samuel Platt appeared as the agents and trustees, attorneys and counsellors of the said Martina Maxine Dole and as such agents and trustees, attorneys and counsellors for the said Martina Maxine Dole, did enter a bid for the aforesaid [10] mining property in the sum of Eighteen thousand five hundred (\$18,500.00) Dollars, which bid was the highest and best bid made at said sale for said mining property and that said bid was thereafter accepted and confirmed and that the said defendants John S. Sinai and Samuel Platt as the agents, trustees, attorneys and counsellors for the

said Martina Maxine Dole did pay on account of the said purchase price of the said property the sum of Eighteen hundred fifty (\$1850.00) Dollars as the first installment payment required to be paid in cash on the said sale price thereof; that said bid for mining property and the said sale thereof was confirmed in the name of the said defendant John S. Sinai. In this respect, however, said plaintiffs allege on such information and belief that the said defendant John S. Sinai was not acting individually on his own behalf but as the agent, trustee, attorney and counsellor for the said Martina Maxine Dole.

XVII.

That thereafter and prior to the date of the final installment of the sale price of the said mining property so purchased by the said defendants John S. Sinai and Samuel Platt as the agents, trustees, attorneys and counsellors of the said Martina Maxine Dole, in the name of the said defendant John S. Sinai at said Receiver's sale, as aforesaid, the said defendants John S. Sinai and Samuel Platt, as plaintiffs are informed and believe and upon such information and belief allege said fact to be, in violation of the trust relation then existing between the said last named defendants and the said Martina Maxine Dole, as aforesaid, and in violation of the duty of said last named defendants as the agents, trustees, attorneys and counsellors of the said Martina Maxine Dole, to consummate the purchase [11] of said mining property for her account and to make the most favorable arrangement possible for

her for obtaining the additional Sixteen thousand six hundred fifty (\$16,650.00) Dollars more or less required to be paid as the final installment of the sale price of said mining property, and with intent to defraud the said Martina Maxine Dole out of any profit out of said investment of the said mining property other than the return of her said investment together with a profit thereon of Five hundred (\$500.00) Dollars, did the following:

(a) That the said defendants John S. Sinai and Samuel Platt entered into an agreement with one George G. Morse, a machinery man residing in the City of Denver, state of Colorado, under the terms of which the said George G. Morse agreed to advance the said defendant John S. Sinai the sum of Sixteen thousand six hundred fifty (\$16,650.00) Dollars with which to complete the payment of the sale price of the said mining property, all of which plaintiffs are informed and believe and upon such information and belief allege was never communicated to the said Martina Maxine Dole by either of the defendants John S. Sinai or Samuel Platt.

(b) That the said defendant John S. Sinai agreed to use the said money so obtained from the said George G. Morse to complete the payment of the sales price of the said property so sold at said Receiver's sale and to have said sale of said property confirmed to the said defendant John S. Sinai and that the said defendant John S. Sinai would then transfer, convey and deliver all of the said mining property so purchased in his name but as the agent, trustee, attorney and counsellor of the

said Martina Maxine Dole at said Receiver's sale, as aforesaid, to the defendant, Sierra Consolidated Mines, Inc., a corporation, in consideration of the issuance of [12] certain shares of stock of said corporation fully paid, which shares would be owned and shared between the said defendants John S. Sinai and Samuel Platt and the said George G. Morse in the proportion of one-half thereof by the said defendants John S. Sinai and Samuel Platt and the remaining one-half thereof by the said George G. Morse, and that as further consideration for such assignment, transfer and delivery of said mining property to said last named corporation, said corporation would agree to pay to the said defendants John S. Sinai and Samuel Platt the sum of Sixteen thousand six hundred fifty (\$16,650.00) Dollars approximately in cash, all of which plaintiffs are informed and believe and upon such information and belief allege was never communicated to the said Martina Maxine Dole by either of the defendants, John S. Sinai or Samuel Platt; and,

(c) That it was agreed between the said George G. Morse and said defendants John S. Sinai and Samuel Platt that the said defendants John S. Sinai and Samuel Platt should inform the said Martina Maxine Dole and her then husband, the said defendant Arthur A. Dole that after purchasing the said mining property at said Receiver's sale thereof for the use and benefit of the said Martina Maxine Dole, as aforesaid, and paying to the Receiver who had made such sale the aforesaid sum of Twenty-five hundred (\$2500.00) Dollars which

had been sent by the said Martina Maxine Dole to the said defendants John S. Sinai and Samuel Platt for said purchase, that said defendants John S. Sinai and Samuel Platt had been compelled to re-sell all of said mining property in order to obtain the money necessary to complete the payment of said sale price of said mining property and that for a time the said defendants John S. Sinai and Samuel Platt were fearful that they would not be able to make any [13] re-sale of any of said mining property and that the said Martina Maxine Dole would lose her investment of Twenty-five hundred (\$2500.00) Dollars and that the said defendants John S. Sinai and Samuel Platt had been forced and compelled to sell the aforesaid mining property in order to obtain from such sale the return of the aforesaid investment of Twenty-five hundred (\$2500.00) Dollars plus a profit of Five hundred (\$500.00) Dollars, and in this respect plaintiffs are informed and believe and upon such information and belief allege that the said defendants John S. Sinai and Samuel Platt did subsequently so inform the said Martina Maxine Dole.

XVIII.

That at the time the said George G. Morse entered into said contract with the said defendants John S. Sinai and Samuel Platt, as aforesaid, both the said George G. Morse and the said defendants John S. Sinai and Samuel Platt had notice and knowledge and were charged with notice and knowledge that the said defendant John S. Sinai had

made a bid for said mining property at said Receiver's sale and had been the successful bidder thereof as the agent, trustee, attorney and counselor for the said Martina Maxine Dole and not otherwise and that all of the rights the said defendant John S. Sinai then had in and to the said mining property as the said successful bidder thereof at the said Receiver's sale were not in his own right but as the agent, trustee, attorney and counsellor for the said Martina Maxine Dole.

XIX.

That thereafter the said defendants John S. Sinai and Samuel Platt paid the remainder of the sale price of said mining property purchased by the said defendant John S. Sinai under the facts and circumstances hereinbefore alleged at said Receiver's sale, as aforesaid, with the money received [14] from the said George G. Morse under said agreement so entered into, as aforesaid, whereupon said sale thereof was confirmed to him by an order of Court duly made and entered and thereupon the said D. C. McKay, as said Receiver, conveyed the said mining property and the whole thereof to the said defendant John S. Sinai by a good and sufficient deed duly acknowledged so as to entitle the same to be recorded and delivered possession of the said mining property together with all equipment, incidentals and appurtenances thereunto belonging, to the said defendant John S. Sinai.

XX.

That plaintiffs are informed and believe and upon such information and belief allege that immediately after the conveyance and confirmation of said sale of said mining property to the said defendant John S. Sinai, as aforesaid, that the said John S. Sinai conveyed all of said mining property to the said defendant, Sierra Consolidated Mines, Inc., a corporation, by good and sufficient deed and bill of sale duly acknowledged so as to entitle the same to be recorded, and delivered possession of said mining property and all appurtenances thereunto belonging and the whole thereof to the said Sierra Consolidated Mines, Inc., a corporation; that at the time said conveyance of said mining property was made to the said Sierra Consolidated Mines, Inc., a corporation, said corporation was wholly controlled and dominated by the said defendants John S. Sinai, Samuel Platt and George G. Morse, and that at the time of the said conveyance of said mining property to said corporation and at all times since then the said Sierra Consolidated Mines, Inc., a corporation, and the Board of Directors thereof had notice and knowledge and were charged with notice and knowledge that said mining [15] property so sold, assigned and transferred by the said John S. Sinai to it was the property of Martina Maxine Dole and that the said defendant John S. Sinai merely held that the legal title thereof as the agent and trustee for the said Martina Maxine Dole and that the conveyance and delivery of said mining

property by the said defendant John S. Sinai to said corporation was made by said defendant John S. Sinai without authority and in violation of his obligations and duties as agent and trustee for the said Martina Maxine Dole and in fraud of the rights of the said Martina Maxine Dole.

XXI.

That plaintiffs are informed and believe and upon such information and belief allege that the mining property so purchased at the aforesaid Receiver's sale by the said defendants John S. Sinai and Samuel Platt, as the agents, trustees, attorneys and counsellors for the said Martina Maxine Dole, as aforesaid, is reasonably worth the sum of Three million (\$3,000,000) Dollars, and that since the acquisition by the said defendant Sierra Consolidated Mines Inc., a corporation, of said property, that the said defendants John S. Sinai and Samuel Platt have received dividends and attorneys fees and other moneys from the said defendant Sierra Consolidated Mines Inc., a corporation, from the said property so held by them, as aforesaid, in excess of Fifty thousand (\$50,000.00) Dollars; that all property obtained by the said defendants John S. Sinai and Samuel Platt, including all stock of the defendants Sierra Consolidated Mines, Inc., a corporation, all moneys received from said last named defendant, and all other moneys received as attorney's fees or otherwise, were in reality received by said defendants John S. Sinai and Samuel

[16] Platt and are now held by said defendant John S. Sinai and Samuel Platt as the agents, trustees, attorneys and counsellors of the said Martina Maxine Dole, deceased, and that by reason of the death of the aforesaid Martina Maxine Dole and of the said probate proceedings and of the heirship of said last named deceased, as aforesaid, all of the said last named property now held by the said defendants John S. Sinai and Samuel Platt is held, to-wit an undivided one-third interest thereof is property of the said plaintiffs, Virginia Davis Hartman and Margaret Davis Richardson.

XXII.

That the said plaintiff, Virginia Davis Hartman, is now and during all of the times mentioned in this complaint was a resident of the State of New York; that the said plaintiff, Margaret Davis Richardson, is now and during all of the times mentioned in this complaint was a resident of the State of New Jersey; that said plaintiffs were not during any of the times mentioned in this complaint residents of or residing either in the State of California or the State of Nevada, and that all of the aforesaid facts and circumstances alleged in this complaint were not known nor discovered by said plaintiffs or either of them until the year 1938, to-wit, that said facts and circumstances were not discovered by the said plaintiff Virginia Davis Hartman until on or about the 21st day of April, 1938, and by the said plaintiff Margaret Davis Richardson until on or about

the first day of July, 1938; that said plaintiffs did upon the said discovery of said facts and circumstances promptly cause said facts and circumstances to be investigated and did authorize and instruct the above entitled action to be commenced in their names and for and on their behalf. [17]

XXIII.

That subsequent to the death of the said Martina Maxine Dole on the 3rd day of February, 1934, and almost immediately thereafter, the said defendant Arthur A. Dole communicated with the said plaintiffs, Virginia Davis Hartman and Margaret Davis Richardson, sisters of the said Martina Maxine Dole, deceased, as aforesaid, advising the said plaintiffs of the death of their said sister, as aforesaid, and further advising the said plaintiffs of the fact that the said Martina Maxine Dole died intestate, and that under the laws of the State of California that they were heirs of the said Martina Maxine Dole, deceased, to the extent as hereinbefore more specifically mentioned and set forth. That the said defendant, Arthur A. Dole, further advised the said plaintiffs that there were certain matters involving the property of the said Martina Maxine Dole, deceased, that would require attention and likewise services of an attorney or attorneys at law to represent said heirs of the said Martina Maxine Dole, deceased, as aforesaid, and that he, the said defendant, Arthur A. Dole, had or was about to procure the services of the said defendant, C. F. Humphrey

and Luther Elkins to represent him as an heir at law of the said Martina Maxine Dole, deceased, and suggested that he, the defendant Arthur A. Dole, would be very glad to protect the interests of the said plaintiffs and to have said defendants, C. F. Humphrey and Luther Elkins, act as attorneys for all of the heirs at law, including said plaintiffs, of the said Martina Maxine Dole, deceased; that said suggestion met with the approval of said plaintiffs and said approval was communicated by them to the said defendant, Arthur A. Dole; that the said defendant Arthur A. Dole did not at said time or at any time subsequent thereto advise the said plaintiffs [18] specifically as to any of the property or other rights belonging to the said deceased, Martina Maxine Dole, and more particularly any or all of the facts or circumstances involved and existing between said Martina Maxine Dole, deceased, during her lifetime and the said defendants Samuel Platt and John S. Sinai concerning the purchase of the said mining property, all of which has been heretofore more specifically alleged and set forth.

XXIV.

That plaintiffs are informed and believe and upon such information and belief allege that the said defendant, Arthur A. Dole, subsequent to the death of the said Martina Maxine Dole, deceased, and subsequent to the aforesaid understanding had between him and the said plaintiffs, as aforesaid, consulted and hired the said defendants, C. F. Humphrey and

Luther Elkins as attorneys to represent the interests of the heirs at law of the said Martina Maxine Dole, deceased, and at said time the said defendant, Arthur A. Dole, thoroughly explained to the said defendants, C. F. Humphrey and Luther Elkins all of the facts and circumstances concerning the transaction had between the said Martina Maxine Dole, deceased, and the said defendants Samuel Platt and John S. Sinai concerning the said purchase of the said mining property as herein more specifically set forth and alleged; that the defendant Arthur A. Dole did enter into a written contract with the said defendants, C. F. Humphrey and Luther Elkins hiring the said last named defendants as attorneys in and about the matter of the alleged transaction had between the said Martina Maxine Dole, deceased, during her lifetime, and the said defendants, Samuel Platt and John S. Sinai, concerning the purchase of the said mining property, as aforesaid, and that the said defendant Arthur A. Dole did by said contract agree to pay to the said defendants C. F. Humphrey and Luther Elkins a sum equal to one-half of any and all moneys recovered from the said defendants, [19] Samuel Platt and John S. Sinai, for the reasons hereinbefore more specifically set forth; that said contract was made for the benefit of the said defendant, Arthur A. Dole, and the said plaintiffs, Virginia Davis Hartman and Margaret Davis Richardson; that several and many conferences were had between the said defendant, Arthur A. Dole, the said defendants C. F. Humphrey and

Luther Elkins, acting as attorneys for the heirs at law of the said Martina Maxine Dole, deceased, and as attorneys for the defendant, Bank of America National Trust and Savings Association, a national banking association, special administrator of the estate of the said Martina Maxine Dole, deceased, as aforesaid, and officers and officials of the said defendant, Bank of America National Trust and Savings Association, a national banking association, concerning the aforesaid transaction had between the said Martina Maxine Dole, deceased, during her lifetime, and the said defendants Samuel Platt and John S. Sinai, as hereinbefore more specifically alleged, and likewise the rights and remedies of the said estate of the said Martina Maxine Dole, deceased, and the heirs at law of the said Martina Maxine Dole, deceased; that as a result of said conversations had between the said defendants Arthur A. Dole, C. F. Humphrey, Luther Elkins, and Bank of America National Trust and Savings Association, a national banking association, *is* agents and officials, as aforesaid, the said defendants C. F. Humphrey and Luther Elkins advised that in their opinion a cause of action existed in favor of the heirs at law of the said Martina Maxine Dole, deceased, against the said defendants Samuel Platt and John S. Sinai in and about the matters hereinbefore more particularly alleged, as aforesaid; that thereafter the said defendant Bank of America National Trust and Savings [20] Association, a banking association, communicated with said defendants

Samuel Platt and John S. Sinai concerning the aforesaid alleged cause of action existing in favor of the heirs at law of the estate of said Martina Maxine Dole, deceased, as aforesaid, and against the said last named defendants, and as a result of said communications and subsequent conferences had between the defendants, John S. Sinai, Samuel Platt, and the officers and agents of the defendant Bank of America National Trust and Savings Association, a national banking association, it was agreed between said last named defendants that said cause of action should be compromised by the payment by the said defendant, John S. Sinai, to the said defendant Bank of America National Trust and Savings Association, a national banking association, as special administrator of the estate of Martina Maxine Dole, deceased, the sum of Five thousand (\$5000.00) Dollars.

XXV.

That plaintiffs are informed and believe and upon such information and belief allege that the said defendants, Arthur A. Dole, C. F. Humphrey, and Luther Elkins, upon being advised of the contemplated compromise by and between said defendant John S. Sinai and the said Bank of America National Trust and Savings Association, a national banking association, as aforesaid, strenuously objected to the said contemplated compromise; that the said defendant, Bank of America National Trust and Savings Association, a national banking asso-

ciation, its officials and agents, did thereupon inform the said defendants, C. F. Humphrey and Luther Elkins, that the said defendants, C. F. Humphrey and Luther Elkins were acting as the attorneys for the said defendant, Bank of America National Trust and Savings Association, a national banking association, as special administrator of the [21] estate of Martina Maxine Dole, deceased, and that said last named defendant was not asking the opinion of the said defendants, C. F. Humphrey and Luther Elkins, as to matters of policy, and that if they, the said defendants, C. F. Humphrey and Luther Elkins were unwilling to present to the Probate Court in which the said matters of the estate of said Martina Maxine Dole, deceased, was then pending, a petition for compromise as tentatively agreed, as aforesaid, that the said defendant Bank of America National Trust and Savings Association, a national banking association, would procure the services of other attorneys to represent it as special administrator in the matter of the said estate of Martina Maxine Dole, deceased.

XXVI.

That thereafter, to-wit, on or about the 7th day of May, 1936, the said defendant, C. F. Humphrey and Luther Elkins, as attorneys for the said defendant, Bank of America National Trust and Savings Association, a national banking association, the then duly acting and qualified special administrator of the said estate of Martina Maxine Dole,

deceased, as aforesaid, did prepare and cause to be filed for and on behalf of the said last named defendant, as said special administrator in the said matter of the estate of said Martina Maxine Dole, deceased, then pending in the Superior Court of the State of California, in and for the County of San Mateo, as aforesaid, a petition for authority to compromise the alleged indebtedness due from the said defendant, John S. Sinai, to the said heirs at law of the said Martina Maxine Dole, deceased, for the said sum of Five Thousand (\$5000.00) Dollars, and that thereafter the said Superior Court of the State of California, in and for the County of San Mateo, in the matter of the said estate of [22] Martina Maxine Dole, deceased, to-wit on or about the 25th day of May, 1936, did by an order approve the requested and suggested compromise by and between the said defendant, John S. Sinai, and the said defendant Bank of America National Trust and Savings Association, a national banking association, as special administrator of the said estate of the said Martina Maxine Dole, deceased, concerning the aforesaid cause of action then existing in favor of the heirs at law of the said Martina Maxine Dole, deceased, against the said defendant, John S. Sinai, as aforesaid.

XXVII.

That plaintiffs are informed and believe and upon such information and belief allege that subsequent to the entry of the said order by the said Superior Court of the State of California, in and for the

County of San Mateo, in the matter of the said estate of Martina Maxine Dole, deceased, authorizing and approving said compromise by and between said defendant, John S. Sinai, and the said defendant, Bank of America National Trust and Savings Association, a national banking association, as special administrator of the estate of Martina Maxine Dole, deceased, as aforesaid, to-wit, on the 11th day of May, 1936, the said defendant Bank of America National Trust and Savings Association, a national banking association, as special administrator of the said estate of Martina Maxine Dole, deceased, did purport to execute a complete release and discharge in favor of the said defendant, John S. Sinai, concerning all claims and alleged indebtedness due by said last named defendant to the heirs at law of the said Martina Maxine Dole, deceased, as aforesaid.

XXVIII.

That plaintiffs are informed and believe and upon such [23] information and belief allege that subsequent to the aforesaid agreement entered into by and between the defendant, John S. Sinai, and the defendant Bank of America National Trust and Savings Association, a national banking association, special administrator of the estate of Martina Maxine Dole, deceased, compromising the aforesaid indebtedness, the said defendant, Arthur A. Dole, under facts and circumstances that will hereinafter be more particularly alleged, signed and executed a release purporting to release the said defendant John S. Sinai from any and all obligations owing

to the said defendant, Arthur A. Dole, as an heir at law of the said Martina Maxine Dole, deceased, in and about the matters hereinbefore more specifically alleged; that said release, however, so executed by the said defendant Arthur A. Dole to the said defendant John S. Sinai did not nor did the same purport to release any cause of action existing in favor of the plaintiffs against the said defendant, John S. Sinai, or any or all of any remaining defendants by reason of the matters hereinbefore more specifically set forth and alleged.

XXIX.

That thereafter, the said defendant John S. Sinai did pay to the said defendant Bank of America National Trust and Savings Association, a national banking association, special administrator of the estate of Martina Maxine Dole, deceased, the sum of Five thousand (\$5000.00) Dollars; that thereafter said superior Court of the said State of California, in and for the county of San Mateo, in the matter of the estate of Martina Maxine Dole, deceased, did enter a decree of final distribution as hereinbefore more specifically alleged and referred to and by said decree did ratify and approve the aforesaid compromise between the said defendant, John S. [24] Sinai and the said defendant, Bank of America National Trust and Savings Association, a national banking association, as special administrator of the said estate of Martina Maxine Dole, deceased, as aforesaid; that under and by vir-

tue of the said decree of final distribution the said defendant C. F. Humphrey and Luther Elkins did receive the sum of Twenty five hundred (\$2500.00) Dollars under and by virtue of the contract so entered into by and between the said last named defendants and the said defendant, Arthur A. Dole, employing the said defendants, C. F. Humphrey and Luther Elkins as the attorneys for the heirs at law of the said Martina Maxine Dole, deceased, as aforesaid, and the said defendants, C. F. Humphrey and Luther Elkins did further receive a share in the remaining sum of Twenty five hundred (\$2500.00) Dollars to the extent that said sum of Twenty five hundred (\$2500.00) Dollars increased the value of the said estate of Martina Maxine Dole, deceased, pursuant to and by virtue of certain laws and statutes of the State of California providing for the payment of attorneys fees upon a fixed valuation of the estate of deceased persons.

XXX.

That plaintiffs are informed and believe and upon such information and belief allege that the defendant, John S. Sinai, and other defendants named in this proceeding and cause of action will claim some rights under said order of the Superior Court of the State of California, in and for the County of San Mateo, authorizing the aforesaid compromise between the said defendant, John S. Sinai, and the said defendant Bank of America National Trust and Savings Association, a national banking asso-

ciation, as aforesaid, the release executed by the said defendant Bank of America [25] National Trust and Savings Association, a national banking association, to the said defendant John S. Sinai, releasing the said last named defendant from all obligations owing to the said heirs at law of the said Martina Maxine Dole, deceased, as aforesaid, the release executed by the said defendant Arthur A. Dole to the said defendant John S. Sinai, releasing the aforesaid defendant from said indebtedness, as aforesaid, and the final decree of distribution of the said Superior Court of the State of California, in and for the County of San Mateo, in the matter of the said estate of Martina Maxine Dole, deceased, as aforesaid.

XXXI.

That plaintiffs are informed and believe and upon such information and belief allege that the aforesaid order of said Superior Court of the State of California, in and for said County of San Mateo, in the matter of the estate of Martina Maxine Dole, deceased, approving and authorizing the said suggested and requested compromise of the said alleged indebtedness due to the said estate of Martina Maxine Dole, deceased, and the said heirs at law of the said last named deceased person, by the said defendant, Bank of America National Trust and Savings Association, a national banking association, special administrator of the said estate of Martina Maxine Dole, deceased, with the said defendant John S. Sinai, as aforesaid, the aforesaid

release and discharge made and executed by the said defendant, Bank of America National Trust and Savings Association, a national banking association, special administrator of the said estate of Martina Maxine Dole, deceased, in favor of the said defendant John S. Sinai, as aforesaid, the said release and discharge made and executed by the said defendant, Arthur A. Dole, to the said defendant John S. Sinai, [26] as aforesaid, and the decree of final distribution of the Superior Court of the State of California in and for the County of San Mateo, in the matter of the estate of the said Martina Maxine Dole, deceased, sanctioning and approving the aforesaid compromise between the said defendant, Bank of America National Trust and Savings Association, a national banking association, special administrator of the estate of Martina Maxine Dole, deceased, and the said defendant, John S. Sinai, as aforesaid, were and each of them was procured by fraud of the various defendants herein acting in concert and motivated by the common design of procuring the aforesaid compromise, said fraud being extrinsic in its nature and character, to-wit:

(a) That plaintiffs are informed and believe and upon such information and belief allege that at the time that the petition was filed by the defendant, Bank of America National Trust and Savings Association, a national banking association, for leave to settle and compromise the aforesaid alleged indebtedness owing by the defendant, John S. Sinai, to the said estate of Martina Maxine Dole, deceased,

and to the heirs at law of Martina Maxine Dole, deceased, as aforesaid, and for some time prior thereto, and during all of the times thereafter as in this complaint mentioned, to and including the date of the entry of the final decree of distribution in the matter of the estate of the said Martina Maxine Dole, deceased, as aforesaid, the First National Bank of Nevada, formerly the First National Bank of Reno, was a national banking institution organized and existing under and by virtue of the laws of the United States of America, and that during all of said times the said defendant, John S. Sinai, was an officer and director of said last mentioned [27] institution and during all of said times the said defendants, John S. Sinai and Samuel Platt were duly licensed practicing attorneys at law under the laws of the State of Nevada, and as such were attorneys for the said First National Bank of Nevada, formerly the first National Bank of Reno, a national banking institution, and that during all of said times the said First National Bank of Nevada, formerly the First National Bank of Reno, was owned, managed, operated and controlled by the Trans-america Corporation, a corporation, which said last named corporation also during all of said time owned, managed, operated and controlled the defendant, Bank of America National Trust and Savings Association, a national banking association; that by reason of the aforesaid facts there existed during all of said times a fiduciary relationship between the said defendants Samuel Platt and John

S. Sinai, and the said defendant Bank of America National Trust and Savings Association, a national banking association; that said relationship actuated and motivated the said defendant, Bank of America National Trust and Savings Association, a national banking association, as special administrator of the estate of Martina Maxine Dole, deceased, to sanction and approve and likewise petition and request the said Superior Court of the State of California, in and for the County of San Mateo, in the matter of the said estate of the said Martina Maxine Dole, deceased, to approve and authorize the aforesaid compromise of said alleged indebtedness and likewise motivated and actuated the said defendant, Bank of America National Trust and Savings Association, a national banking association, to execute the aforesaid release in favor of the said defendant John S. Sinai releasing and discharging the said last named defendant for all and any [28] of the aforesaid alleged indebtedness. That all of the aforesaid information was withheld from the Superior Court of the State of California, in and for the County of San Mateo, in the matter of the estate of Martina Maxine Dole, deceased, by the said defendants C. F. Humphrey, Luther Elkins and the Bank of America National Trust & Savings Association, a national banking association, special administrator of the said estate of Martina Maxine Dole, deceased, at the time that the said petition for leave to compromise said alleged indebtedness was heard and determined by the said last mentioned Court

and at the time that the said Court made and caused to be entered a decree of final distribution which contained an order approving and settling the account of the said special administrator and approving the aforesaid compromise and release of the said indebtedness.

(b) That plaintiffs are informed and believe and upon such information and belief allege that shortly before the time set for the hearing of the said petition for leave to compromise the aforesaid indebtedness alleged to be owing by the defendant John S. Sinai, as aforesaid, the said defendant Arthur A. Dole consulted with the said defendants C. F. Humphreys and Luther Elkins concerning the opposing the granting of the said petition to compromise the aforesaid indebtedness. That the said defendant Arthur A. Dole informed the said defendants C. F. Humphreys and Luther Elkins that he the said defendant Arthur A. Dole was opposed to the said compromise for the reasons hereinafter set forth and that he did not consider said compromise for the best interests of either the said estate of Martina Maxine Dole, deceased, or the heirs of the said last named deceased person; that the said defendant Arthur A. Dole was informed by the said defendants C. F. Humphreys and Luther Elkins that they agreed [29] with him that the said contemplated compromise was not for the best interests of the said estate of the heirs-at-law of said Martina Maxine Dole, but that it was useless for him or anyone else to oppose the petition of said Bank

of America National Trust & Savings Association, a national banking corporation, the special administrator of the estate of Martina Maxine Dole, as aforesaid, as the Court would not listen seriously to any of the heirs of the last named deceased in opposing the aforesaid petition to compromise but on the contrary would grant the petition to compromise said indebtedness irrespective of any opposition on the part of any of the aforesaid heirs; that the said defendants C. F. Humphrey and Luther Elkins further advised the defendant Arthur A. Dole that in their opinion the proposed compromise of the said indebtedness was illegal and would not be binding on the heirs of the said Martina Maxine Dole, deceased, and in any event would not release any defendant other than the defendant John S. Sinai; that the said defendants C. F. Humphrey and Luther Elkins did further counsel and advise the said defendant Arthur A. Dole not to appear before the said Court at the hearing of the said petition to compromise the alleged indebtedness as he would accomplish nothing by so doing and that they the defendants C. F. Humphrey and Luther Elkins would represent the heirs of the said Martina Maxine Dole, deceased, that subsequent to the aforesaid conversation between the defendants C. F. Humphrey and Luther Elkins and the defendant Arthur A. Dole as aforesaid the said defendants C. F. Humphrey and Luther Elkins did prepare and furnish to the defendant Arthur A. Dole a written opinion to the effect that the said compromise was

not binding on the heirs at law of the said Martina Maxine Dole, deceased, as far as the defendant Samuel Platt was concerned; that the defendant Arthur A. Dole [30] relied upon the aforesaid advice and statements of the defendants C. F. Humphrey and Luther Elkins, as aforesaid, and as a result thereof did not appear before the said Court either at the hearing of the petition to compromise the said indebtedness or at the time of the hearing and determination of the petition for final distribution as aforesaid. That for the reasons hereinbefore alleged the said defendant Arthur A. Dole did at the suggestion and upon the advice of the said defendants C. F. Humphrey and Luther Elkins sign and execute the aforesaid release, releasing and discharging the said defendant John S. Sinai from all claims concerning the said indebtedness as aforesaid.

(c) That plaintiffs are informed and believe and upon such information and belief allege that the defendants C. F. Humphrey and Luther Elkins and the said defendant Bank of America National Trust & Savings Association, a national banking corporation, acting through its officers, agents and employees, appeared both at the hearing of the petition for leave to compromise the aforesaid indebtedness and the petition for final distribution, as aforesaid, and that at both of the aforesaid hearings failed and neglected to call to the attention of the Court the true facts and circumstances of the transaction had by the said Martina Maxine Dole during her lifetime and the said defendants Samuel Platt

and John S. Sinai, as aforesaid, the fact that there in reality existed no indebtedness due from the last named defendants to the estate of Martina Maxine Dole, deceased, or to the heirs of said deceased person, except such as was incidental to the said transaction, but on the contrary that by reason of the said transaction had by the said Martina Maxine Dole during her lifetime with the defendants Samuel Platt and John S. Sinai and the relationship existing between said last named persons as aforesaid, the said [31] Martina Maxine Dole died possessed of valuable rights in real property which rights by reason of the death of the said Martina Maxine Dole had become vested in the heirs at law of the said Martina Maxine Dole; that the defendants C. F. Humphrey and Luther Elkins and the defendant Bank of America National Trust & Savings Association, a national banking corporation, further failed and neglected to explain at either or both of the aforesaid hearings the relationship existing between the said defendants Samuel Platt and John S. Sinai and the defendant Bank of America National Trust & Savings Association, a national banking corporation, as aforesaid, the relationship existing between the defendants C. F. Humphrey and Luther Elkins and the heirs at law of the said Martina Maxine Dole, deceased, as aforesaid, the reasons that actuated the said defendant Bank of America National Trust & Savings Association, a national banking corporation, in effecting said compromise and in petitioning for leave to

compromise said alleged existing indebtedness, as aforesaid, the fact that the defendant Arthur A. Dole had been counseled and advised not to appear before the said Court by the defendants C. F. Humphrey and Luther Elkins, to oppose the granting of the said petition to compromise the said alleged indebtedness as aforesaid, the fact that the said defendants C. F. Humphrey and Luther Elkins had agreed to represent the heirs at law of the said Martina Maxine Dole at both of the aforesaid hearings, as aforesaid, and all of the other facts and circumstances as hereinbefore alleged.

(d) That the said defendants C. F. Humphrey and Luther Elkins and the said defendant Bank of America National Trust & Savings Association, a national banking corporation, appeared before the said Superior Court of the State of California, in and for the said County of San Mateo in the matter of the estate [32] of Martina Maxine Dole, deceased, at both the aforesaid hearings upon the said petitions for leave to compromise said alleged indebtedness and for final distribution and represented to said Court that it was for the best interests of the estate of Martina Maxine Dole, deceased, and the heirs at law of the said last named deceased person, that the said alleged indebtedness be compromised and that the said Court approve the same. That said representations to the said Court by said last named defendants, that said compromise was for the best interests of the heirs at law of said Martina Maxine Dole were wilfully and fraudulently made

by said defendants for the purpose of misleading said Court and obtaining from said Court the requested authorization to compromise said alleged indebtedness. That said real property belonging to said estate of Martina Maxine Dole, deceased, and the said heirs of said last named deceased person, then in the possession of said defendants, Samuel Platt and John S. Sinai as aforesaid, was worth many times more than the amount procured by the said defendant Bank of America National Trust & Savings Association, a banking association, in settlement of the alleged indebtedness, all of which the said defendant Bank of America National Trust & Savings Association, a banking association, and the said defendant John S. Sinai, well knew, and that said petition for compromise was filed and said representations made to said Court for the sole and only purpose of procuring a release in favor of said defendant, John S. Sinai, for the said indebtedness in and about the matters referred to in this complaint. That in addition to the making of the aforesaid representations the said defendant Bank of America National Trust & Savings Association, a banking association, and the said defendant John S. Sinai, fraudulently withheld and concealed from said Court at the time of procuring of said order and at [33] the time of the entering of said decree settling said account and ordering final distribution, many facts material and pertinent to the question of whether or no said compromise should be effected, to-wit that said last named defendants did not in-

form said Court of the true nature of said indebtedness, of the value of said indebtedness, or of the property then held by said defendant John S. Sinai belonging to the said estate of Martina Maxine Dole, deceased and the said heirs of said last named persons, as aforesaid, all of which was then well known to the said defendants, and that said withholding and concealment was made by said last named defendants for the sole and only purpose of procuring said orders approving said compromise and the said decree settling said account of said administrator and decreeing distribution, as aforesaid.

(e) That the said defendants C. F. Humphrey and Luther Elkins, as attorneys for the said defendant Bank of America National Trust & Savings Association, a national banking association, as special administrator of the Estate of Martina Maxine Dole, deceased, and the said defendant Bank of America National Trust & Savings Association, a national banking association, as special administrator of the Estate of Martina Maxine Dole, deceased, failed to inventory in the said estate of the said Martina Maxine Dole, deceased, either the said real property acquired by the said Martina Maxine Dole, deceased, during her lifetime by reason of the transaction had by her with the defendants Samuel Platt and John S. Sinai, as aforesaid, or the actual amount of the alleged indebtedness due from the last named defendants to the said estate of the said Martina Maxine Dole, deceased and to the heirs at law of the said last named deceased person.

XXXIII.

That all of the facts and circumstances set forth and [34] alleged in paragraph XXXII of this complaint had a material bearing on the question and issue as to whether or no the proposed and suggested compromise of the alleged indebtedness due from the said defendant John S. Sinai to the said estate of Martina Maxine Dole and to the heirs of the said last named deceased person, was for the best interests of the said estate and of the said heirs at law of the said Martina Maxine Dole, deceased.

XXXIV.

That none of the facts alleged in this complaint with respect to the conduct and actions of the defendant Bank of America National Trust & Savings Association, a banking association, and the said defendant John S. Sinai with reference to the procurement of said order by the said Superior Court of the State of California, in and for said County of San Mateo, in the matter of the said estate of Martina Maxine Dole, deceased, authorizing the said compromise by the said administrator of the said last named estate and the said John S. Sinai, as aforesaid, and of the order and decree settling the said account and decree of distribution made by said last named Court, as aforesaid, were known to said plaintiffs at the time of the filing of the above entitled action, and that said plaintiffs were placed upon investigation of said facts and circumstances by reason of certain recitals contained in the answer

of the said defendant, John S. Sinai, to plaintiffs' complaint on file herein, including the exhibits attached thereto and that as a result of said investigation all of the aforesaid facts together with the other facts and circumstances alleged in paragraph XXXII of this complaint, were discovered by the plaintiffs approximately on or about the 28th day of January, 1939, about the time that the said answer was filed as aforesaid. [35]

XXXV.

That the defendants Harold P. Davis and Arthur A. Dole are joined as party defendants for the reason that said parties should be party plaintiffs but that the consent of said defendants Harold P. Davis, and Arthur A. Dole could not be obtained to join said last named parties as parties plaintiff; that by reason of the provisions of Section 382 of the Code of Civil Procedure of the State of California, for the foregoing reason said defendants Harold P. Davis, and Arthur A. Dole are named as party defendants in lieu of being named party plaintiffs.

XXXVI.

That by reason of the premises the said heirs at law of Martina Maxine Dole have been damaged in the sum of (\$3,000,000) Three Million Dollars, no part of which has been paid, of which said sum the plaintiffs as heirs at law of the said Martina Maxine Dole, deceased, are entitled to (\$1,000,000) One Million Dollars.

Wherefore, plaintiffs pray that judgment be rendered by this Honorable Court in the sum of (\$3,000,000) Three Million Dollars in favor of the heirs at law of the said Martina Maxine Dole, deceased, against said defendants and that said Court should decree and adjudicate that the plaintiffs are entitled as heirs at law of the said Martina Maxine Dole, deceased to the sum of (\$1,000,000) One Million Dollars of the amount of the said judgment as prayed; that the said defendants be by order judgment and decree of this Honorable Court, required to account to the said plaintiffs and to the other heirs at law of the said Martina Maxine Dole, deceased, for all money and property now in their possession, formerly belonging to the said Martina Maxine Dole, now deceased, and that judgment be rendered accordingly, that this Honorable [36] Court order, adjudge and decree that the order of the Superior Court of the State of California in and for the County of San Mateo, in the matter of the estate of Martina Maxine Dole, deceased, authorizing the compromise of the said alleged indebtedness, the order settling the account of the defendant Bank of America National Trust and Savings Association, a National Banking Association included in the final decree of distribution by said last mentioned Court in said last mentioned estate, the agreement executed by the defendant Arthur A. Dole, releasing and discharging the defendant John S. Sinai from all claims under said indebtedness, the agreement executed by the defend-

ant Bank of America National Trust & Savings Association, a National Banking Association, releasing and discharging the defendant John S. Sinai from all claims by reason of the said alleged indebtedness, be and each of said be declared void by reason of having been obtained by fraud under the facts and circumstances as in this complaint alleged for the course of this suit, and for such other further equitable and other relief as may be proper in the premises.

RUSSELL P. TYLER,

MARSHALL B. WOODWORTH,

Attorneys for Plaintiffs.

[Endorsed]: Filed Nov. 16, 1940. [37]

[Title of District Court and Cause.]

MOTION TO DISMISS

To the plaintiffs above named and to Messrs. Russell P. Tyler and Marshall B. Woodworth, their attorneys:

You and each of you will please take notice that on Monday, the 27th day of January, 1941, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, in the courtroom of Honorable Michael J. Roche, Judge of the above entitled court, in the Post Office Building, 7th & Mission Streets, San Francisco, California, Bank of America National Trust and Savings Association, one of the defendants in the above-entitled action,

will move the above entitled court to dismiss the said action so far as it is concerned.

The said motion will be made upon this notice of motion and upon all the records and papers on file in the said action and will be made upon the ground that the second amended complaint on file in the said action fails to state a claim upon which relief can be granted as against the said Bank for the following reasons:

First, that the order of the Superior Court of the State of California in and for the County of San Mateo, referred to in said complaint, authorizing the Bank as administrator of the estate of Martina Maxine Dole, deceased, to compromise the claim of the said estate against John S. Sinai, one of the defendants in the said action, is *res judicata* in favor of the said Bank so far as any claims the said plaintiffs may be asserting by the said complaint against the said Bank are concerned and bars the said action as against the said Bank.

Second, that the decree of final distribution [38] referred to in the said complaint is *res judicata* in favor of the said Bank so far as any claims the said plaintiffs may be asserting by the said complaint against the said Bank are concerned and bars the said action as against the said Bank.

Third, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by laches.

Fourth, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

Fifth, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by section 343 of the Code of Civil Procedure of the State of California.

Dated: January 16th, 1941.

KEYES & ERSKINE,

By MORSE ERSKINE,

Attorneys for Bank of Amer-
ica N. T. & S. A. [39]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES ON BANK OF
AMERICA N. T. & S. A. MOTION TO DIS-
MISS.

After the plaintiffs had filed their amended complaint, defendant Bank of America National Trust & Savings Association filed a notice of motion to dismiss said action. Defendant Bank of America filed briefs in support of said motion to dismiss.

The motion to dismiss which will be made on January 27, 1941, will be made upon the said briefs

hereinabove referred to, and upon all the records and papers on file in said action.

KEYES & ERSKINE

Attorneys for defendant Bank
of America N. T. & S. A.

(Admission of Service)

[Endorsed]: Filed Jan. 16, 1941. [40]

[Title of District Court and Cause.]

ORDER

On motion of defendant Bank of America N. T. & S. A. for dismissal of plaintiffs' second amended complaint, it is ordered that the motion be granted, with leave to plaintiffs of twenty days within which to amend.

Dated: May 28, 1941.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed May 28, 1941. [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now come Virginia Davis Hartman and Margaret Davis Richardson, the plaintiffs in the above-entitled suit, and hereby appeal from the final order and judgment of the above-entitled Court, made

and entered on the 28th day of May, 1941, sustaining the Motion to Dismiss of the defendant, Bank of America National Trust & Savings Association, to plaintiffs' second amended complaint; that said defendant, Bank of America National Trust & Savings Association, is the appellee; that said appeal is being taken to the United States Circuit Court of Appeals for the Ninth Circuit.

San Francisco, Calif.,
August 25, 1941.

RUSSELL P. TYLER,
MARSHALL B. WOODWORTH,
Attorneys for Plaintiffs and
Appellants.

Receipt of Service.

[Endorsed]: Filed Aug. 26, 1941. [42]

[Title of District Court and Cause.]

COST BOND ON APPEAL

The premium charge on this bond is \$10.00 per annum.

Know all Men by these Presents, That we, Virginia Davis Hartman and Margaret Davis Richardson, as principals, and United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto Bank of America National Trust & Savings Association, in the full and just sum of Two hundred and fifty (\$250.00) dollars, to

be paid to the said Bank of America National Trust & Savings Association, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severately by these presents. Sealed with our seals and dated this 25th day of August in the year of our Lord One Thousand Nine Hundred and Forty-One.

Whereas, lately at a District Court of the United States, for the Northern District of California, Southern Division, in a suit depending in said Court, between Virginia Davis Hartman and Margaret Davis Richardson, plaintiffs and appellants, and Bank of America National Trust & Savings Association, defendant and appellee, an order and judgment sustaining the demurrer of Bank of America National Trust & Savings Association, defendant and appellee, was rendered against the said Virginia Davis Hartman and Margaret Davis Richardson, plaintiffs and appellants, and the said Virginia Davis Hartman and Margaret Davis Richardson, plaintiffs and appellants, having filed a Notice of Appeal, as required by law to reverse the order and judgment in the aforesaid suit, to the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Virginia Davis Hartman and Margaret Davis Richardson, plaintiffs and appellants, shall prosecute their appeal to effect, and answer all

damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "express Agreement" for summary judgment, and execution thereon, pursuant to the laws, rules and statutes in such instances made and provided for and/or pursuant to Rule 34 of the said District Court.

[Seal] UNITED STATES FIDELITY
AND GUARANTY COMPANY
By ANN MORRISON,
Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On this 25th day of August in the year one thousand nine hundred and forty-one before me George Gillen, a Notary Public in and for the City and County of San Francisco, personally appeared Ann Morrison known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that she subscribed the name of the United States Fidelity and Guaranty Company thereto as surety and her own name as Attorney-in-fact.

GEORGE GILLEN,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires January 1, 1943.

[Endorsed]: Filed Aug. 26, 1941. [43]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL.

(Assignments of Error)

Now come the appellants and serve and file their statement of the points on which they intend to rely on the appeal as follows:

I.

That the Court erred in sustaining the Motion to Dismiss of the defendant and appellee, Bank of America National Trust & Savings Association, to plaintiffs and appellants second amended complaint.

II.

That the Court erred in holding and deciding that the plaintiffs and appellants second amended complaint did not state a cause of action as against defendant and appellee, Bank of America National [44] Trust & Savings Association.

Wherefore the appellants pray that the order and judgment of the above-entitled Court made and entered on the 28th day of May, 1941, sustaining the demurrer of the defendant and appellee, Bank of America National Trust & Savings Association, to plaintiffs and appellants second amended complaint be reversed.

San Francisco, Calif.,

August 25, 1941.

RUSSELL P. TYLER

MARSHALL B. WOODWORTH

Attorneys for Appellant.

Receipt of the within Statement of Points On Which Appellants Intend to Rely on Appeal is hereby acknowledged by copy this 26th day of August, 1941.

KEYES & ERSKINE,
Attorneys for Appellee, Bank of America National
Trust & Savings Association.

Receipt of Service.

[Endorsed]: Filed Aug. 26, 1941. [45]

[Title of District Court and Cause.]

REQUEST FOR RECORD ON APPEAL.

To the Clerk of the above-entitled Court and to the Bank of America National Trust & Savings Association, defendant and appellee, and to Messrs. Keyes & Erskine, attorneys for said defendant and appellee, San Francisco, California:

You, and each of you, are hereby notified that the Clerk of the above-entitled Court has been requested by the plaintiffs and appellants to prepare under his hand and the seal of said Court and transmit to the Appellate Court a true copy of the matters designated by the plaintiffs and appellants as follows: (1) Second Amended Complaint; (2) Motion to Dismiss Second Amended Complaint [46] (3) Order of Court made and entered on May 28, 1941,

sustaining the Motion to Dismiss of defendant and appellee, Bank of America National Trust & Savings Association, to plaintiffs and appellants Second Amended Complaint; (4) Notice of Appeal; (5) Statement of Points on which Appellants Intend to Rely on Appeal; (6) Request for Record on Appeal; (7) Bond for Costs.

San Francisco, Calif., August 25, 1941.

RUSSELL P. TYLER,
MARSHALL B. WOODWORTH,
Attorneys for Plaintiffs and
Appellants.

Receipt of the within Request for Record on Appeal is hereby acknowledged by copy this 26th day of August, 1941.

KEYES & ERSKINE,
Attorneys for Defendant and Appellee, Bank of
America National Trust & Savings Association.

Receipt of Service.

[Endorsed]: Filed Aug. 26, 1941. [47]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 47 pages, numbered from 1 to 47, inclusive, contain

a full, true, and correct transcript of the records and proceedings in the case of Virginia Davis Hartman, et al., Plaintiffs, vs. Harold F. Davis, et al., Defendants. No. 21021-R., as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Seven-dollars & thirty-cents (\$7.30) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, at San Francisco, California, this 25th day of September, A. D. 1941.

[Seal]

WALTER B. MALING,

Clerk.

WM. J. CROSBY,

Deputy Clerk.

[Endorsed]: No. 9945. United States Circuit Court of Appeals for the Ninth Circuit. Virginia Davis Hartman and Margaret Davis Richardson, Appellant, vs. Bank of America National Trust & Savings Association, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 6, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit. [48]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 9945

VIRGINIA DAVIS HARTMAN and MAR-
GARET DAVIS RICHARDSON,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION et al.,

Appellee.

DESIGNATION OF RECORD TO BE PRINTED
and

STATEMENT OF POINTS RELIED UPON

To Clerk of Circuit Court of Appeals and Messrs.

Keyes & Erskine, Attorneys for Appellee, San
Francisco, Calif.:

Now come the appellants and designate, pursuant to the rules of the above-entitled Court, the record to be printed on the appeal and hereby request, direct and designate that all of the transcript on appeal as certified be printed; and further state that they will rely upon each, every and all of the statements of points and assignments of error included and set forth in the certified transcript on appeal.

Dated: October 10, 1941, San Francisco, Calif.

RUSSELL P. TYLER,

MARSHALL B. WOODWORTH,

Attorneys for Appellants.

Receipt of the within Designation of Record to be printed and Statement of Points Relied Upon is hereby acknowledged by copy this 9th day of October, 1941.

KEYES & ERSKINE,

Attorneys for Appellee, Bank of America National Trust & Savings Association.

[Endorsed]: Filed Oct. 10, 1941. Paul P. O'Brien, Clerk.

No. 9945

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

VIRGINIA DAVIS HARTMAN and MARGARET
DAVIS RICHARDSON,
Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,
Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

Honorable Michael J. Roche, District Judge.

APPELLANTS' OPENING BRIEF.

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FILED

MAR 27 1942

PAUL P. O'BRIEN,

CLERK

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No. 9945

IN THE

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VIRGINIA DAVIS HARTMAN and MARGARET
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Appellants,

VS.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

Honorable Michael J. Roche, District Judge.

APPELLANTS' OPENING BRIEF.

JURISDICTION OF THE COURT.

This is an appeal from the final order of the District Court of the United States for the Southern Division of the Northern District of California sustaining the motion to dismiss of the appellee to the second amended complaint filed on behalf of the appellants. (Second Amended Complaint, Tr. 1-45; Motion to Dismiss, Tr. 45-48.)

See Rule 73 of Rules of Civil Procedure for the District Courts of the United States; see Act of March

3, 1891, Secs. 24, 28, 26 Stat. at L. 828; Sec. 128 as amended, Judicial Code; see Act of March 3, 1911, as amended (as to appellate jurisdiction).

STATEMENT OF CASE.

The appellants (plaintiffs in the Court below) filed a second amended complaint to establish a trust and for an accounting against the defendant, Bank of America National Trust & Savings Association, hereinafter referred to as the "defendant Bank" for the sake of brevity, and a number of other defendants as shown by the second amended complaint. It charges facts constituting a rank case of fraud and collusion on the part of the defendant Bank and the other defendants named in the second amended complaint. The defendant, John S. Sinai, an attorney in Reno, Nevada, made a motion to dismiss the original complaint, which was overruled and the case is at issue as to him. Thereafter the defendant Bank and others were made parties defendant as shown by the second amended complaint. The defendant Bank made a motion to dismiss the second amended complaint *as to it*, which was sustained by the judge of the lower Court, from which order this appeal is being prosecuted. No opinion, oral or written, was rendered.

SUMMARY STATEMENT OF APPELLANTS' MAJOR CONTENTIONS.

Briefly stated, the defendant Bank (appellee) contended in support of its motion to dismiss the second amended complaint that it "fails to state a claim upon which relief can be granted as against the said Bank for the following reasons:

First, that the order of the Superior Court of the State of California in and for the County of San Mateo, referred to in said complaint, authorizing the Bank as administrator of the estate of Martina Maxine Dole, deceased, to compromise the claim of the said estate against John S. Sinai, one of the defendants in the said action, is *res judicata* in favor of the said Bank so far as any claims the said plaintiffs may be asserting by the said complaint against the said Bank are concerned and bars the said action as against the said Bank.

Second, that the decree of final distribution referred to in the said complaint is *res judicata* in favor of the said Bank so far as any claims the said plaintiffs may be asserting by the said complaint against the said Bank are concerned and bars the said action as against the said Bank.

Third, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by laches.

Fourth, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

Fifth, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by section 343 of the Code of Civil Procedure of the State of California.” (Tr. 45-47.)

The statement of points (assignments of error) is as follows:

“I.

That the Court erred in sustaining the motion to dismiss of the defendant and appellee, Bank of America National Trust & Savings Association, to plaintiffs and appellants’ second amended complaint.

II.

That the Court erred in holding and deciding that the plaintiffs and appellants’ second amended complaint did not state a cause of action as against defendant and appellee, Bank of America National Trust & Savings Association.” (Tr. 52.)

Amplifying this statement of points, it was contended in the Court below by the defendant Bank that the fraud and collusion alleged against the defendant Bank in procuring, as administrator of the estate of Martina Maxine Dole, deceased, a compromise of the claim of the estate against John S. Sinai, a defendant, a director of the defendant Bank of Reno, Nevada, and one of the attorneys in the said action, for the paltry sum of \$5000, whereas the mining property involved is alleged to have been worth \$3,000,000, by suppressing the true facts of the compromise and by misrep-

resenting the entire situation to the Probate Court in San Mateo County, California, and committing, through and by itself as administrator and through and by its attorneys, other acts of fraud and collusion, as are specifically set out in the second amended complaint, resulting in the approval by the Court of the compromise and in the subsequent release of the claim against defendant Sinai, constituted *intrinsic* and not *extrinsic* fraud as claimed by the appellants.

Briefly stated, the contention of the appellants on this appeal is that, under the facts set forth in the second amended complaint, the defendant Bank was guilty of *extrinsic* fraud.

As to the second point urged by the defendant Bank, on its motion to dismiss, that the action was barred by laches and by the statute of limitations of the State of California, this was given scant consideration by the lower Court in view of the facts alleged in the second amended complaint and was not seriously pressed by counsel for the Bank in the lower Court.

ARGUMENT.

FIRST POINT.

EXTRINSIC FRAUD.

Taking up the question first as to whether the fraud, collusion and conspiracy alleged against the defendant Bank and the other defendants constitute *extrinsic* fraud, as claimed by the appellants, it was conceded in the Court below that if the facts relied upon as

pleaded in the second amended complaint constitute *intrinsic* fraud the foregoing orders made by the Probate Court in the said estate of Martina Maxine Dole would be *res adjudicata*. If, on the other hand, said facts and circumstances as pleaded in said second amended complaint constitute *extrinsic* fraud, the said aforesaid orders would not be a bar to the present suit.

Do the facts set up in the second amended complaint allege a case of extrinsic fraud against the defendant Bank?

Martina Maxine Dole died in the County of San Mateo, California, on or about February 3, 1934; that at the time of her death she was a resident of the County of San Mateo and left an estate therein consisting of both real and personal property; that she died intestate and left surviving her as her sole heirs at law the plaintiffs, Virginia Davis Hartman, a sister, and Margaret Davis Richardson, another sister, and defendant Harold F. Davis, a brother, and defendant, Arthur A. Dole, her surviving husband. (See paragraph V of second amended complaint; Tr. 3.)

The defendant Bank applied for and was appointed administrator on June 11, 1934, of the estate of said Martina Maxine Dole, deceased, and duly qualified as such; that on November 30, 1936, the Superior Court of the State of California in and for the County of San Mateo, decreed distribution to said heirs at law of the estate of said Martina Maxine Dole and that said estate was distributed to them in accordance with the ratio and proportion of their respective ownership in and to said property belonging to said deceased.

(See paragraph VI of the second amended complaint; Tr. 3-5.)

The defendants, Samuel Platt and John S. Sinai, were and now are attorneys at law engaged in the general practice of the profession of law as co-partners in the City of Reno, State of Nevada, under the firm name and style of Platt and Sinai. (See paragraph IX of second amended complaint; Tr. 6.)

The defendants, C. F. Humphrey and Luther Elkins, were and now are attorneys at law duly licensed as such under the laws of the State of California; that said defendants were the attorneys of record for and represented the defendant Bank as administrator of the estate of Martina Maxine Dole, deceased; that said defendants also were the attorneys for and represented the defendant Arthur A. Dole, husband of said Martina Maxine Dole, and the plaintiffs, Virginia Davis Hartman and Margaret Davis Hartman, heirs of said Martina Maxine Dole in the matter of the estate of said Martina Maxine Dole. (See paragraph X of second amended complaint; Tr. 6-7.)

The defendants, Samuel Platt and John S. Sinai, were, and for a long time previous to the death of said Martina Maxine Dole had been, the attorneys for said Martina Maxine Dole; that by reason of said relationship of attorney and client there existed and had sometime previous to her death existed a relationship of trust and confidence between the said defendants and said Martina Maxine Dole. (See paragraph XI of second amended complaint; Tr. 7.)

On or about May 11, 1933, the defendant Sinai, on behalf of himself and his partner Platt, notified Martina Maxine Dole and her then husband, defendant Arthur A. Dole, substantially as follows:

(a) That the Silverado and Kentucky Mining property, situated in Mono County, California, consisting of a mine, with machinery and other equipment, was advertised for sale and would be sold at a receiver's sale on or about May 20, 1933. (Paragraph XII of second amended complaint; Tr. 7-8.)

(b) That the machinery had cost \$300,000 and was then in good condition. (Paragraph XII of second amended complaint; Tr. 8.)

(c) That said defendant Sinai had conferred with his friend, receiver D. C. McKay and that said defendant Sinai was led to believe that by reason of the then prevailing money stringency and consequent lack of available buyers all of said mining property would be sold for about \$18,500. (Paragraph XII of second amended complaint; Tr. 8.)

(d) Said defendant Sinai recommended most strongly that the said Martina Maxine Dole could permit said defendants Sinai and Platt to put in a bid at the receiver's sale for and on behalf of said Martina Maxine Dole and that said last named defendants be permitted by said Martina Maxine Dole as her representatives and attorneys to use their best endeavors to purchase all the aforesaid property for the use and benefit of Martina Maxine Dole provided it could be purchased for a sum not to exceed \$25,000.

(Paragraph XII of second amended complaint; Tr. 8-9.)

(e) That said defendant Sinai requested said Martina Maxine Dole to send him immediately the sum of \$2500 in cash to be used by him in paying a 10% installment of the sale price of said property and further represented that it would not be necessary for said Martina Maxine Dole to send him any additional moneys with which to complete the purchase price of the said property as the said defendant Sinai would be able to obtain the remaining nine tenths of the sale price of the said property from a re-sale of certain of the machinery or certain water rights. (Paragraph XII of second amended complaint; Tr. 9.)

The defendant Sinai, at the time of making the aforesaid representations to Martina Maxine Dole, delivered to her an itemized inventory of the real and personal property above referred to, together with a printed notice of said receiver's sale, together with a letter from Mr. D. C. McKay, the receiver who would make the sale addressed to said defendant Sinai, wherein the said McKay advised Sinai that the purchase of said property would be a very fine investment for said Sinai or any friend or client of his as said machinery on said property alone could be readily sold within a short time after the sale for at least \$30,000 cash, which would be about 10% of the original cost of said machinery. (Paragraph XIII of second amended complaint; Tr. 10.)

The machinations of said defendants Sinai and Platt, in inducing Martina Maxine Dole to put up \$2500 in cash for the purchase of the mining property above referred to, are further set forth in Paragraphs XIV, XV and XVI of the second amended complaint. (Tr. 10-13.)

The defendants Sinai and Platt, after purchasing said mining property as the agents, trustees and attorneys of said Martina Maxine Dole in the name of said defendant Sinai at said receiver's sale, in violation of their duty as the agents, trustees and attorneys of said Martina Maxine Dole, to consummate the purchase of said mining property for her account and to make the most favorable arrangement possible for her in obtaining \$16,650 additional, the property having been sold for \$18,500 at receiver's sale, and with intent to defraud the said Martina Maxine Dole out of any profit out of said investment of said mining property other than the return of the said original investment of \$2500 together with a profit thereon of \$500, did the following:

(a) The defendants Sinai and Platt entered into an agreement with one Morse, a machinery man residing in Denver, Colorado, under the terms of which Morse agreed to advance Sinai \$16,650 with which to complete the payment of the sale price of said mining property, all of which was never communicated to the said Martha Maxine Dole by either Sinai or Platt. (Paragraph XVI of second amended complaint; Tr. 14.)

(b) Defendant Sinai agreed to use the moneys he obtained from Morse to complete the payment of the sale price of said property and to have said sale confirmed to the defendant Sinai and then to transfer said mining property to Sierra Consolidated Mines, Inc., a corporation, in consideration of the issuance of certain shares of stock of said corporation fully paid, which shares will be owned by the defendants Sinai and Platt and said Morse in the proportion of one-half to defendants Sinai and Platt and the remaining one-half to said Morse, all of which facts were never communicated to said Martina Maxine Dole by either of the defendants Sinai or Platt. (Paragraph XVII of second amended complaint; Tr. 14-15.)

(c) That it was agreed between said Morse and said defendants Sinai and Platt that the said defendants Sinai and Platt should inform Martina Maxine Dole and her then husband, the said defendant, Arthur A. Dole, that after purchasing said mining property for the use and benefit of said Martina Maxine Dole and paying to the receiver the sum of \$2500 which had been sent by Martina Maxine Dole to said defendants Sinai and Platt for said purchase; that said defendants Sinai and Platt had been compelled to re-sell all of said mining property in order to obtain the money necessary to complete the payment of said sale price of said mining property and that for a time said defendants Sinai and Platt were fearful that they would not be able to make any sale of any of said mining property and that Martina Maxine Dole would lose her investment of \$2500 and that said defendants

had been forced and compelled to sell the mining property in order to obtain from such sale the return of the original investment of \$2500 plus a profit of \$500 and said defendants Sinai and Platt so informed said Martina Maxine Dole. (Paragraph XVII of second amended complaint; Tr. 15-16.)

It is further alleged that when Morse entered into said contract with said defendants Sinai and Platt, both Morse and defendants Sinai and Platt had notice and knowledge that Sinai had made a bid for said mining property and had been the successful bidder as agent, trustee and attorney for said Martina Maxine Dole. (Paragraph XVIII of second amended complaint; Tr. 15-17.)

It is further alleged that defendant Sinai acquired said property and the sale was conferred to him by order of Court and by sufficient deed from said receiver. (Paragraph XIX of second amended complaint; Tr. 17.)

It is further alleged that after so acquiring said mining property said defendant Sinai conveyed the same to Sierra Consolidated Mines, Inc., a corporation, which is wholly controlled and dominated by said defendants Sinai, Platt and Morse with notice and knowledge that said mining property so sold, signed and transferred by said Sinai was the property of Martina Maxine Dole. (Paragraph XX of second amended complaint; Tr. 18-19.)

It is further alleged that said mining property is easily worth the sum of \$3,000,000 and that since the acquisition by said defendant Sierra Consolidated

Mines, Inc., a corporation, of said property the said defendants Sinai and Platt have received dividends and attorneys fees and other moneys from said corporation in excess of \$50,000 and that all property obtained by said defendants Sinai and Platt, including all stock of said corporation, all moneys received as attorneys fees or otherwise, were in reality received by said defendants Sinai and Platt and are now held by them as the agents, trustees and attorneys of said Martina Maxine Dole, deceased, and that by reason of the death of said Martina Maxine Dole and of the probate proceedings and of the heirship of said last named deceased all of the said last named property now held by said defendants Sinai and Platt is the property of the plaintiffs, to-wit: an undivided one-third interest thereof to Virginia Davis Hartman and Margaret Davis Richardson. (Paragraph XXI of second amended complaint; Tr. 19-20.)

It is next alleged that plaintiff, Virginia Davis Hartman, was during all the times mentioned in the said amended complaint a resident of the State of New York; that plaintiff, Margaret Davis Richardson, was during all the times mentioned in the second amended complaint resident of the State of New York; that said plaintiffs were not during any of the times mentioned in the second amended complaint residents of or residing either in California or Nevada and that all of the aforesaid facts and circumstances alleged in the second amended complaint were not known or discovered by said plaintiffs until the year 1938; that upon said discovery of said facts and circumstances

plaintiffs promptly caused said facts and circumstances to be investigated and did instruct and authorize the above entitled action to be commenced in their names and for and on their behalf. (Paragraph XXII of second amended complaint; Tr. 20-21.)

Then follow allegations as to the notification by the defendant Dole, the husband of said Martina Maxine Dole, of the death of said Martina Maxine Dole to the plaintiffs and a suggestion by said defendant Arthur A. Dole that he was employing as his attorneys C. F. Humphrey and Luther Elkins, of San Francisco, California, and suggesting that plaintiffs do likewise; that said defendant Arthur A. Dole entered into a written contract with the said attorneys and defendants, C. F. Humphrey and Luther Elkins, for and on behalf of himself and said plaintiffs to pay said attorneys and defendants a sum equal to one-half of any and all money recovered from said defendants Platt and Sinai for the fraud perpetrated by them as set forth in previous paragraphs of the second amended complaint; that said C. F. Humphrey and Luther Elkins were also the attorneys for the defendant Bank and that after many conferences between said attorneys acting both for defendant Dole and the defendant Bank concerning the said cause of action existing in favor of the heirs at law of the estate of said Martina Maxine Dole, deceased, as against defendants Sinai and Platt, it was agreed between the said last named defendant that said cause of action and compromise by the payment by said defendant Sinai to the said defendant Bank, special administra-

tor of the estate of Martina Maxine Dole, the sum of \$5000. (Paragraphs XXIII, XXIV; Tr. 21-25 of second amended complaint.)

It is at this stage of the allegations of the second amended complaint that the defendant Bank, as special administrator, is directly accused of and became a party to the fraud perpetrated on the estate of Martina Maxine Dole, deceased, and her heirs at law including plaintiffs.

The second amended complaint then alleges that defendants Dole, Humphrey and Elkins, the attorneys both of defendant Dole and plaintiffs and the defendant Bank, upon being advised of the contemplated compromise by and between said defendant Sinai and said defendant Bank, as special administrator of the estate of Martina Maxine Dole etc. strenuously objected to the said contemplated compromise; that said defendant Bank, its officials and agents, did thereupon inform said defendants Humphrey and Elkins, that said defendants Humphrey and Elkins were acting as the attorneys of said defendant Bank, as special administrator of the estate of Martina Maxine Dole, deceased, and that said defendant Bank was not asking the opinion of its said defendant attorneys, Humphrey and Elkins, as to matters of policy, and if they, the said defendants, attorneys Humphrey and Elkins, were unwilling to present to the Probate Court in which said matters of the estate of Martina Maxine Dole, deceased, was then pending a petition for compromise as tentatively agreed, as aforesaid, that the said defendant Bank would procure the services of other attorneys

to represent it as special administrator in the matter of said estate of Martina Maxine Dole, deceased. (Paragraph XXV of second amended complaint; Tr. 25-26.)

It is further alleged that thereafter said defendant attorneys Humphrey and Elkins, of the defendant Bank, as special administrator of said estate of Martina Maxine Dole, prepared and filed and caused to be obtained by said defendant Bank as such special administrator the order of the Superior Court of the State of California in and for the County of San Mateo in the matter of the estate of Martina Maxine Dole, deceased, approving said compromise in the sum of \$5000 from said defendant Sinai. (Paragraph XXVI of second amended complaint; Tr. 26-27.)

It is further alleged that in pursuance of said order of the Probate Court so obtained by said defendant Bank as special administrator of the estate of Martina Maxine Dole, deceased, approving said compromise between said Sinai and defendant Bank as administrator of said estate, the defendant Bank executed complete release and discharge in favor of said defendant Sinai concerning all claims and alleged indebtedness due by said defendant Sinai to the heirs at law, including plaintiffs, of Martina Maxine Dole, deceased. (See paragraph XXVII of second amended complaint; Tr. 27-28.)

Then follow allegations that said compromise and releases between defendant Sinai and defendant Bank as special administrator of the estate of Martina Maxine Dole, deceased, did not nor did the same pur-

port to release any cause of action existing in favor of the plaintiff against said defendant Sinai or said defendant Bank or any or all of the remaining defendants for the matters hereinbefore specifically set forth and hereinafter more specifically set forth and alleged. (See paragraph XXVIII of second amended complaint; Tr. 28-29.)

It is further alleged that defendant Sinai paid to said defendant Bank as special administrator of the estate of Martina Maxine Dole, deceased, said sum of \$5000; that thereafter said Probate Court entered a decree of final distribution in the matter of the estate of Martina Maxine Dole, deceased, and by said decree ratified and approved the aforesaid compromise between said defendant Sinai and said defendant Bank, as special administrator of the estate of Martina Maxine Dole, deceased; that under and by virtue of said decree of final distribution the said attorneys of said defendant Bank, defendants Humphrey and Elkins received the sum of \$2500 under and by virtue of the contract so entered into as aforesaid by and between said last named defendant and the defendant Dole as attorneys for the heirs at law of said Martina Maxine Dole, deceased, and the defendants, Humphrey and Elkins, did further receive a share in the remaining \$2500 to the extent that said sum of \$2500 increased the value of said estate of Martina Maxine Dole, deceased, pursuant to and by virtue of certain laws and statutes in the State of California providing for the payment of attorneys fees upon a fixed valuation of estates of deceased per-

sons. (See paragraph XXIX of second amended complaint; Tr. 29-30.)

It is next alleged that said order of said Probate Court, approving and authorizing the compromise of said alleged indebtedness due to the estate of Martina Maxine Dole, deceased, and the said heirs at law of said last named deceased person by the said defendant Bank, as special administrator of said estate, with the defendant Sinai and the releases and discharges obtained thereunder were and each of them was procured by a fraud of the various defendants herein acting in concert and motivated by the common design of procuring the aforesaid compromise, including said defendant Bank, said fraud being extrinsic in its nature and character, to-wit:

(a) That at the time the petition was filed by defendant Bank to settle and compromise the indebtedness owing by defendant Sinai to the estate of Martina Maxine Dole, deceased, and to her heirs at law, and for some time prior thereto and during all the times thereafter in the second amended complaint alleged, the First National Bank of Nevada, formerly the First National Bank of Reno, was a national banking institution, and that during all of said times the said defendant Sinai who was an officer and director of said institution and during all of said times said defendants Sinai and Platt were the attorneys for said First National Bank of Nevada and that during all of said times said First National Bank of Nevada, was owned, managed, operated and controlled by the Transamerica Corporation, which said last

named corporation also during all of said time was owned, managed, operated and controlled by the defendant Bank; that by reason of the aforesaid facts there existed during all of said times a fiduciary relationship between said defendants Platt and Sinai and said defendant Bank; that said relationship actuated and motivated said defendant Bank as special administrator of the estate of Martina Maxine Dole, deceased, to sanction and approve and likewise petition and request the Probate Court to approve and authorize the aforesaid compromise and likewise motivated and actuated said defendant Bank to execute the aforesaid release in favor of said defendant Sinai releasing and discharging him for all and any of the aforesaid indebtedness; that all of the aforesaid information was withheld from the Probate Court in the matter of the estate of Martina Maxine Dole, deceased, by said defendant Bank and by said defendants Humphrey and Elkins, attorneys for said defendant Bank as well as attorneys for defendant, Arthur A. Dole, and the plaintiffs as heirs at law of said Martina Maxine Dole, deceased, at the time that the said petition for leave to compromise said alleged indebtedness was heard and determined by the said last mentioned Court and at the time said Court made and caused to be entered a decree of final distribution which contained an order approving and settling the account of the said special administrator and approving the aforesaid compromise and release of the said indebtedness. (Paragraph XXXI of second amended complaint; Tr. 31-38.)

Note: Here we have an affirmative allegation of extrinsic fraud, to-wit: The suppression of information from the Probate Court of the intimate, fiduciary relations existing between the defendant Bank and defendant Sinai and the actions of the defendant Bank in proposing and approving of the compromise of \$5000 by defendant Sinai to the estate of Martina Maxine Dole, deceased, and of the plaintiffs as her heirs, for his fraudulent conduct in acquiring the valuable mining property alleged to be worth \$3,000,000; suppressing the fact from the Probate Court that the defendant Sinai was a director and occupied fiduciary relations with the defendant Bank in one of its branches in the State of Nevada and that defendants Sinai and Platt were the attorneys for said defendant Bank in Nevada, and although the defendant Bank as special administrator of the estate of Martina Maxine Dole, deceased, and of the plaintiffs as her heirs, owed the highest duty to see to it as such special administrator that they receive the best possible settlement for the fraud of defendant Sinai and a sum largely in excess of the \$5000 compromise. If this does not constitute extrinsic fraud, what does?

Reverting to the allegations of the second amended complaint alleging extrinsic fraud we find

(b) It is alleged that shortly before the time set for the hearing of the petition for compromise the indebtedness owing by defendant Sinai, the defendant Dole consulted with defendants Humphrey and Elkins concerning the opposing the granting of said

petition for compromise; that the said defendant Dole informed defendants Humphrey and Elkins that he was opposed to the compromise as he did not consider it to the best interest of either the estate of Martina Maxine Dole, deceased, or her heirs (including plaintiff); that said defendant Dole was informed by said defendants Humphrey and Elkins that they agreed with him that the said compromise was not for the best interest of said heirs at law of said estate but that it was useless for him or anyone else to oppose the petition of said defendant Bank as special administrator, as the Court would not listen seriously to any of the heirs in opposition to the petition to compromise but on the contrary would grant the petition to compromise irrespective of any opposition on the part of said heirs; that the said defendants Humphrey and Elkins further advised defendant Dole that in their opinion the proposed compromise was illegal and would not be binding on the heirs of said Martina Maxine Dole, deceased, and in any event would not release any defendant other than the defendant Sinai; that defendants Humphrey and Elkins did further counsel and advise said defendant Dole not to appear before the Court at the hearing of said petition to compromise as he would accomplish nothing by so doing and that they, the defendants Humphrey and Elkins, would represent the heirs of said Martina Maxine Dole, deceased; that subsequent to the aforesaid conversation between defendants Humphrey and Elkins and the defendant Dole the defendants Humphrey and Elkins did prepare and furnish to the defendant Dole a written opin-

ion to the effect that said compromise was not binding on the heirs at law of said Martina Maxine Dole as far as the defendant Platt was concerned; that the defendant Dole relied upon the aforesaid advice of said defendants Humphrey and Elkins and as a result thereof did not appear before the said Probate Court. That for the reasons heretofore alleged the said defendant Dole did at the suggestion and upon the advice of said defendants Humphrey and Elkins sign and execute the aforesaid release, releasing and discharging said defendant Sinai from all claims concerning the said indebtedness as aforesaid. (Paragraph XXXI of second amended complaint; Tr. 35-37.)

Note: Here we have the two attorneys representing the defendant Bank as special administrators and also the heirs at law of said Martina Maxine Dole, deceased, suppressing from the Probate Court the fact that defendant Dole, as one of the heirs, opposed the settlement and compromise (of course, plaintiffs living in the East knew nothing of these machinations and fraud by the defendant Bank and their attorneys) and lulling said Dole into a fancied security by advising him that said settlement and compromise by said defendant Bank in the Probate Court would not hold in law, and actually keeping him from appearing before the Probate Court at the hearings on the compromise so that he could not make known to the Court his objections to the inadequacy of the settlement as being a fraud on the rights of the heirs at law of said Martina Maxine Dole. If these

acts of the attorneys for the defendant Bank and of the Bank itself as special administrator in suppressing from the Probate Court the true state of facts relating to the compromise and in advising heir at law Dole not to appear in Court do not constitute clear cases of extrinsic fraud, then no case can be imagined which would?

Again reverting to the allegations of the second amended complaint alleging extrinsic fraud we find

(c) That defendants Humphrey and Elkins and said defendant Bank as special administrator, acting through its officers, agents and employees appeared at the hearings to compromise and for final distribution and failed and neglected to call to the attention of the Probate Court the true facts and circumstances of the transactions had by the said Martina Maxine Dole during her lifetime and said defendants Platt and Sinai; failed and neglected to call to the attention of the Probate Court that said Martina Maxine Dole died possessed of valuable rights in said mining property which rights by reason of her death had become vested in her heirs at law; that said defendants Humphreys and Elkins as the attorneys for said defendant Bank as such special administrator, and said defendant Bank failed and neglected to explain to said Probate Court the relationship existing between said defendants Platt and Sinai and said defendant Bank, and the relationship existing between the defendants Humphrey and Elkins and the heirs at law of said Martina Maxine Dole, and the reasons that actuated the defendant Bank, as special

administrator, in effecting said compromise in behalf of said defendant Sinai, one of the directors of their branch Banks and their attorneys in Nevada, and the fact that defendant Dole had been counselled and advised not to appear before the Probate Court by the defendants Humphrey and Elkins, the attorneys for the defendant Bank as special administrator. (Paragraph XXXI of second amended complaint; Tr. 37-39.)

(d) That said defendants Humphrey and Elkins, as the attorneys for said defendant Bank as such administrator, and said defendant Bank, appeared before the Probate Court and petitioned for and obtained leave to compromise as above stated and represented to said Probate Court that it was for the best interest of said estate of said Martina Maxine Dole, deceased, and the heirs at law of said last named person, that said alleged indebtedness be compromised and that the said Probate Court approved the same. That said representations to said Probate Court by said last named defendants, including the defendant Bank, as special administrator, that said compromise was for the best interest of the heirs at law of said Martina Maxine Dole were wilfully and fraudulently made by said defendants for the purpose of misleading the Probate Court and obtaining from said Probate Court the requested authorization to compromise said alleged indebtedness. That said mining property belonging to said estate and the said heirs including plaintiffs, then in the possession of said defendants Platt and Sinai as aforesaid was

worth many times more than the amount secured by the said defendant Bank in compromise of said indebtedness, all of which said defendant Bank and said defendant Sinai well knew and that said petition for compromise was filed and said representations made to said Probate Court for the sole and only purpose of procuring a release in favor of said defendant John Sinai. That said defendant Bank and said defendant Sinai fraudulently withheld and concealed from the Court the true nature of said indebtedness, of the value of said indebtedness, or of the property then held by said defendant Sinai belonging to the estate of Martina Maxine Dole, deceased, and said heirs of said last named person, all of which was then well known to said defendants and that said withholding and concealment was made by said last named defendants for the sole and only purpose of securing said orders approving said compromise and the said decree settling said account of said special administrator, the defendant Bank, and decreeing distribution as aforesaid. (Paragraph XXXI of second amended complaint; Tr. 39-41.)

(e) That said defendants Humphrey and Elkins as attorneys for defendant Bank as special administrator and said defendant Bank as said special administrator of said estate, failed to inventory in the said estate of said Martina Maxine Dole, deceased, either the said real property acquired by the said Martina Maxine Dole, deceased, during her lifetime by reason of the transaction had by her with the defendants Platt and Sinai as aforesaid, or the actual

amount of the alleged indebtedness due from the last named defendants to the estate of said Martina Maxine Dole, deceased, and to the heirs at law of the said last named deceased person. (Paragraph XXXI of second amended complaint; Tr. 41.)

It is further alleged that all the facts and circumstances set forth in paragraph XXXII (paragraph XXXI of said second amended complaint) had a material bearing on the question and issue as to whether or no the proposed and suggested compromise of the alleged indebtedness due from defendant Sinai to the said estate of Martina Maxine Dole and to the heirs of said last named deceased person was for the best interest of said estate and of the said heirs at law including plaintiffs. (See paragraph XXXIII of second amended answer; Tr. 42.)

It is next alleged that the facts constituting the fraud committed by the defendant Bank and said defendant Sinai were not known to said plaintiffs at the time of the filing of the original complaint, and that said plaintiffs were placed upon investigation of said facts and circumstances by reason of certain recitals contained in the answer of said defendant Sinai, including the exhibits attached thereto and that as a result of said investigation all of the aforesaid facts together with the other facts and circumstances alleged in paragraph XXXII (XXXI of this second amended complaint) were discovered by the plaintiffs approximately on or about the 28th day of January, 1939, about the time that the said answer was filed as aforesaid. (See paragraph XXXIV of second amended complaint; Tr. 42-43.)

There is an allegation that defendants Davis and Dole are joined as party defendants for the reason that the consent of said defendants could not be obtained; that by reason of the provisions of Section 382 of the Code of Civil Procedure of the State of California, the said defendants Davis and Dole are named as party defendants. (See paragraph XXXV of second amended complaint; Tr. 43.)

Finally, it is alleged that said heirs at law have been damaged in the sum of \$3,000,000, no part of which has been paid, of which said sum the plaintiffs as heirs at law of the said Martina Maxine Dole, deceased, are entitled to \$1,000,000. (See paragraph XXXVI of second amended complaint; Tr. 43.)

It is difficult to conceive of a stronger case of extrinsic fraud, as disclosed by the allegations of the second amended complaint, against the defendant Bank. It owed, as special administrator of the estate of Martina Maxine Dole, deceased, the highest duty of trust and loyalty to the estate and to the heirs thereof. Instead of being faithful to its high trust and duty, it deliberately connived and conspired to defraud the estate and heirs by its machinations in favor of defendant Sinai, its attorney and fellow director of one of its banks in Nevada and obtained a compromise in favor of defendant Sinai in the paltry sum of \$5,000 of a claim worth many times that amount by suppressing from the Probate Court the true state of facts and deliberately misrepresenting the true situation to the Probate Court and preventing, through its own attorneys, defendants Humphrey and Elkins, the appearance of defendant Dole, one of

the heirs at law, from appearing in Court before the Probate Court to voice and testify as to his objections to the proposed compromise and his reasons therefor.

Before entering into further argument in support of our contention that the second amended complaint strongly and convincingly sets out a case of extrinsic fraud against the defendant Bank, we will refer to a few elementary propositions, which were apparently ignored by the Judge of the Court below.

In the first place the motion to dismiss is, in law, the equivalent of a demurrer.

Equity Rule 29 (U. S. Supreme Court Rules).

A demurrer admits the truth of all matters well pleaded and all the reasonable inferences to be drawn therefrom.

Vol. 5 Ency. of U. S. Sup. Ct. Rep. 309 and many cases cited.

An examination of the points and authorities submitted by counsel for the defendant bank in the Court below disclosed that there was only really one point urged by them in support of their motion to dismiss said action, namely that the order confirming the so-called compromise and the order settling the account of the defendant bank as the administrator of the estate of Martina Maxine Dole in the probate proceedings previously pending in the Superior Court of the State of California, in and for the County of San Mateo, are *res adjudicata* of the facts alleged in plaintiffs' second amended complaint. In this respect, counsel for defendant bank contends that the facts

relied upon by the plaintiffs as constituting fraud are intrinsic in their character.

Counsel for defendant Bank, in the Court below, relied for the most part, in their argument that the facts as thus pleaded in the second amended complaint constitute intrinsic as distinguished from extrinsic fraud, upon the cases of *Carr v. Bank of America*, 11 Cal. (2d) 366; *Perna v. Bank of America*, 28 Cal. App. (2d) 372; *Ruinwalt v. Bank of America*, 3 Cal. (2d) 680, and *McLaughlin v. Security First National Bank*, 20 Cal. App. (2d) 602.

We assume that they will again rely on these same authorities on this appeal.

It is interesting to note that of the four cases principally relied upon by counsel for defendant Bank, three present facts charging the defendant Bank in the instant proceeding with fraudulent and negligent conduct. These cases are, however, easily distinguishable from the instant proceeding in that an examination of the facts recited in the opinions of the foregoing cases reveal that at least the Bank called to the attention of the Probate Court at the time of procuring the orders relied upon, all facts actually constituting what was subsequently charged as fraudulent conduct. It follows that if the facts were before the Court said fraud would of necessity be intrinsic as distinguished from extrinsic. It would seem from an examination of the aforesaid facts that the chief complaint was that certain information was withheld from the Court by way of explanation of conditions

that motivated and actuated the defendant Bank in its effort to procure the sanction of the Probate Court in and about the matters therein complained of.

All of these cases involved facts entirely different from the issues presented in the instant proceeding. In every one of these cases the Court had actual knowledge of all of the investments made by the defendant Bank as executor or trustee. The statements made to the Court might have been false, assuming that the charges contained in the subsequent complaints attacking the orders were true. But these statements and facts were not in issue. To exemplify the distinction thus presented we will quote briefly from the opinion in the *McLaughlin* case, *supra*:

“In approving the acts of the trustee in making the investments it had reported, the Probate Court necessarily had open before it the question of the legality of the investments and the matter of their economic merit as well. The approval of these investments, requested by the trustees, presented for determination at least these two issues. The false representations and lack of complete revealment on these issues, therefore, went to the merits of the cause submitted for judgment. They constituted intrinsic not extrinsic fraud.”

The amended complaint in the instant proceedings consists of two counts. In the first count it is alleged in effect that the defendants Samuel Platt and John S. Sinai were attorneys for Martina Maxine Dole during her lifetime and that they acted for her as her attorneys, trustees, and agents in and about the pur-

chase of valuable mining property; that they bought said property in the name of the defendant Sinai and pursued a course of fraudulent conduct tending to deceive the said Martina Maxine Dole as to the true nature of the investments and to their own benefit and profit procured said property to the detriment of their client. In the second cause of action many of the allegations contained in the first cause of action are made a part of the second cause of action by way of reference and by said references are incorporated as a part and portion of said second cause of action. In the said second cause of action it is further alleged that the said Samuel Platt and John S. Sinai were likewise the attorneys and directors for a bank in Reno which was owned, operated, managed and controlled by the Transamerica Corporation and which in turn operated, managed, owned and controlled the defendant Bank.

It is of course elementary and well established that an administrator is the agent for the heirs of a deceased person.

The pleading as thus presented, therefore, establishes a fiduciary relationship existing between the defendants Samuel Platt and John S. Sinai with the aforesaid Martina Maxine Dole during her lifetime, a fiduciary relationship existing between the said Samuel Platt and John S. Sinai and the defendant Bank at the time that the defendant Bank acted as the administrator of the estate of the said Martina Maxine Dole and procured the orders from the Probate Court which are now relied upon as constituting

a bar to the instant proceeding, and a fiduciary relationship existing between the defendant Bank and the plaintiffs, Virginia Davis Hartman and Margaret Davis Richardson as heirs at law of the said Martina Maxine Dole by reason of the fact that said defendant Bank was at the time of the procuring of the aforesaid orders from said Probate Court acting as the administrator of the estate of the said Martina Maxine Dole, as aforesaid.

We believe this contention to be self evident as it is of course exceedingly elementary that the relationship of attorney and client is of the highest fiduciary character.

Clark v. Millsap, 197 Cal. 765;

Metropolis Trust & Savings Bank v. Monnier,
169 Cal. 592, on page 598.

It is also elementary that the relationship existing between the administrator and heirs is of the highest fiduciary character.

In the case of *Hewitt v. Hewitt* (9th C.C.A., 1927), 17 F. (2d) 716, the Court in discussing this question say:

“No doubt, where litigants are dealing at arm’s length, they are under no obligation to disclose to their adversaries the weakness of their cause of action or defense, but this rule has little or no application *where a fiduciary relation exists between the parties, and that such relationship does exist between an administratrix and the heirs of the estate is well settled.* *Dismond v. Connolly* (1918; C.C.A. 9th), 251 F. 234 (writ of certiorari denied in (1918) 248 U.S. 561, 63 L. ed. 422, 39

S. Ct. 7) same case (1921; C.C.A. 9th), 276 F. 87 (writ of certiorari denied in (1921) 257 U.S. 656, 66 L. ed. 420, 42 S. Ct. 169).'' (Italics ours.)

Under the laws of the State of California it is well settled that a person in a fiduciary capacity may not take part in any transaction in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary. Section 2230 *Civil Code* of the State of California.

The Civil Code further provides that a violation of the provisions on trust is a fraud against the beneficiary. Section 2234 *Civil Code* of the State of California.

It must of necessity follow that the only rational conclusion that can be drawn from what has been said so far is that the relationship of an attorney at law and his clients and the relationship of an administrator and the heirs of an estate are fiduciary, to-wit, a trust relationship, and that the rules applicable to trustees are applicable to attorneys and administrators, and that therefore any breach of a fiduciary relationship is a fraud against the client or heirs respectively representing the beneficial interests that any such attorney, administrator or executor represents in their representative and fiduciary capacity.

To judge if such a fraud is extrinsic or intrinsic we must consider if the relationship of the defendant Bank and the defendant Sinai and Pratt was an issue raised before the Probate Court in which the aforesaid orders, now relied upon, were procured.

If the matters constituting the collusion and fraud as presented in the instant proceeding were not an issue and were not presented to the Probate Court in procuring the aforesaid orders, the same could not by any possible stretch of the imagination be intrinsic and would of necessity have to be extrinsic in their character.

That such matters were not presented to the Probate Court at the time of the procuring of the aforesaid orders appears specifically from the matters pleaded in the second count of the amended complaint in the instant proceeding, and were fraudulently suppressed, which affirmatively alleges as follows:

“That in addition to the making of the aforesaid representations the said defendant Bank of America National Trust & Savings Association, a banking association, and the said defendant John S. Sinai, *fraudulently withheld and concealed from said Court at the time of procuring of said order and at the time of the entering of said decree settling said account and ordering final distribution, many facts material and pertinent to the question of whether or no said compromise should be effected, to-wit that said last named defendants did not inform said Court of the true nature of said indebtedness, of the value of said indebtedness, or of the property then held by said defendant John S. Sinai belong to the said estate of Martina Marine Dole, deceased and the said heirs of said last named persons, as aforesaid, all of which was then well known to the said defendants, and that said withholding and concealment was made by said last named defendants for the sole and only purpose of procuring*

said orders approving said compromise and the said decree settling said account of said administrator and decreeing distribution, as aforesaid." (Tr. 40-44.)

It will be noticed that in the foregoing quoted portion of the second amended complaint the word "indebtedness" is used. Possibly it would have been better to have used the word "alleged" before the word "indebtedness" for the reason that said word "indebtedness" is used advisedly. In this connection the allegations contained in the first count and separate cause of action must be read and it appears from said allegations that there was in reality no indebtedness existing between said estate of Dole and the said defendants Sinai and Platt but that the claim of said estate of Dole was that the said defendants Sinai and Platt were holding property in trust for the benefit of the deceased and after her death became the trustees for her heirs at law. The term "indebtedness" was used because of the fact that in procuring the orders from the Probate Court the said controversy then existing between the estate of Dole and the said defendants Platt and Sinai was improperly treated as an indebtedness.

It is of course well settled and elementary that property, both held in trust and otherwise, vests *eo instanti* upon the death of a deceased person in the heirs of the decedent, and that the only purpose of probate is two-fold, namely to pay debts of the deceased, including expenses of administration, and secondly, to determine heirship. Conceding that the

facts alleged in the second amended complaint in the instant proceeding are true, all of the interests of Martina Maxine Dole in the property alleged to have been held in trust by the defendants Platt and Sinai vested in the heirs at law immediately upon the death of Mrs. Dole, including the plaintiffs Virginia Davis Hartman and Margaret Davis Richardson. It is hard, indeed, to understand how the orders relied upon, even conceding for the moment that the defense of intrinsic fraud has some merit to it, which of course we do not concede, would constitute a bar for the reason that under the probate laws of this state only an indebtedness can be compromised. No Probate Court, which is a court of limited jurisdiction, has the right to deprive or divest the title of real property vested by operation of law in the heirs of a deceased person. We submit this point, by way of passing, as it must be obvious that in any event the grounds set forth in the motion to dismiss must of necessity be insufficient upon which to predicate any such order.

Before further considering the argument of counsel for defendant Bank to the effect that the facts as alleged in the complaint merely constitute intrinsic fraud, we notice that the case of *Pico v. Cohn*, 91 Cal. 129, is cited to the Court in support of the aforesaid contention. An examination of this case reveals that it presented an issue of bribery of witnesses and necessary perjury resulting therefrom. We have no quarrel with the rule of law that perjured testimony constitutes at most intrinsic fraud. Indeed it could

not be otherwise if there is to be any finality to litigation, for obviously in most every case someone has told the truth and others an untruth. The testimony presented at any trial can never be reconciled—that is the very purpose for which Courts are organized and constituted, namely to determine the truth and credibility of testimony presented by various witnesses. If the law permitted the integrity and honesty of witnesses to be the basis of either a direct or a collateral attack upon judgments, there would of necessity be no end to litigation. Just what applicability this elementary rule has to the present proceeding we must, of necessity, plead our lack of understanding.

A further examination of all of the cases cited by counsel for defendant Bank reveals that the Court itself makes clear the distinction between intrinsic and extrinsic fraud, and in most of the opinions the Court points out that if the facts constitute extrinsic, as distinguished from intrinsic fraud, any orders of a probate Court would not constitute a bar to the proceeding and would not be *res adjudicata*.

As stated before, the main issue before this Honorable Court is that the relationship existing between the respective parties as aforesaid was not called to the attention of the Probate Court. Nothing on the face of the probate proceedings could indicate the collusion of all of these parties and the abuse of the estate imposed in them while acting in a fiduciary relationship and that therefore the heirs had no rea-

son to raise the issue and the Probate Court had no reason to determine any such issue of collusion, fraud and negligence. We quote from the learned author of California Jurisprudence:

“Collusion may constitute extrinsic fraud, as where an administrator and his attorney collusively procured a sale of estate realty for the latter’s benefit and to the detriment of the persons represented by them, and there was nothing on the face of the proceedings to indicate the collusion and no opportunity to determine any issue of fraud in the probate court. So collusion between the plaintiff and one defendant whereby a previous partial payment by the latter is fraudulently concealed from his codefendant is a ground for equitable relief.”

15 *Cal. Juris.* p. 21.

In the case of *Bergin v. Haight*, 99 Cal. 52, the Court at page 55 of the opinion say:

“It is claimed by appellant that this is a collateral attack upon the orders of the probate court, and since the records of the proceedings shows that the court had acquired jurisdiction, and that the proceedings were upon their face regular, the order confirming the sale cannot be thus attacked.

“It is true, the court did acquire jurisdiction to administer upon the estate, and to order and confirm the sale of the property; but it does not follow therefrom that this is a collateral attack. The attack is a direct attack upon the sale, on the ground of fraud, and as such is authorized by law. (Van Fleet’s Collateral Attack, pp. 4, 5, 15,

and authorities cited.) It is not every species of fraud, however, which may be the basis of an action to vacate an order or judgment. *To be actionable, as stated by our chief justice in Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, it must be 'a fraud extrinsic or collateral to the questions examined and determined in the action * * * Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat, or being regularly employed, corruptly sells out his client'. The fraud herein relied upon falls within the principle illustrated by the example stated above, and certainly within the principle underlying many other cases. (*Jones v. Hanna*, 81 Cal. 507; *Johnson v. Waters*, 111 U. S. 667; *Griffith v. Godey*, 113 U. S. 93; *Mayberry v. McClurg*, 51 Mo. 256; *Hardy v. Broaddus*, 35 Tex. 668; *Warner v. Blakeman*, 4 Keyes 487; *La Rue v. Friedman*, 49 Cal. 278; *Caldwell v. Caldwell*, 45 Ohio St. 513.) The plaintiff had only constructive notice of the administration and proceedings to sell. Furthermore, there is nothing upon the face of the proceedings to indicate a fraudulent collusion between the administrator and his attorney. There was no opportunity to determine an issue of fraud in the probate court. The administrator was acting as trustee and agent for the owners of the property, whether such owners were heirs or assignee of heirs, and the defendant stood in the same confidential relation. (*Ex parte James*, 8 Ves. 343; *O'Dell v. Rogers*, 44 Wis. 136-178; *West v. Waddill*, 33

Ark. 586; *Phillips v. Benson*, 82 Ala. 500; *Hawley v. Cramer*, 4 Cowen 718-733; *Bakers v. Humphrey*, 101 U. S. 494."

It is interesting to note, in that portion of the opinion of *Bergin v. Haight*, supra, above quoted, that the Court points out that the heirs at law could of necessity only at most have had constructive notice of the proceedings and that the said fraud and collusion did not appear upon the face of said proceedings. This is particularly true in the instant proceedings for it appears from the facts recited and alleged in the second amended complaint that both the plaintiffs were residents of the State of New York and no contention or claim is made that either of said plaintiffs ever had actual notice of the presentation of the compromise to the Probate Court nor that any of the acts now complained of appear upon the face of the probate proceedings. On the contrary it appears from the allegations of the second amended complaint in the instant proceedings that the first actual notice that the plaintiffs had that the Probate Court had attempted to authorize any compromise of their property rights was when an answer was filed by the defendant Sinai in the instant proceeding, whereupon the plaintiffs within seasonable time amended their complaint setting forth the fraud now relied upon in procuring not alone the so-called order authorizing the said compromise of the alleged indebtedness but likewise the order confirming and approving the defendant Bank's account as administrator and decree of distribution. (Tr. 42-43.)

In *Curtis v. Schell*, 129 Cal. 208, at page 217, the Court cites with approval the case of *Johnson v. Waters*, 111 U. S. 640, using the following language:

“*Johnson v. Waters*, 111 U. S. 640, was an original suit in the circuit court of the United States for the district of Louisiana, brought for the purpose of setting aside fraudulent and void sales made by a testamentary executor under the orders of the probate court in said state. In that case it was contended that the plaintiff was concluded by the proceedings in the probate court, which was alleged to have exclusive jurisdiction of the subject matter, and that its decision was conclusive against the world, especially against the plaintiff, who was a party to the proceedings. The supreme court of the United States in its opinion, conceding that the administration of the estate there in question properly belonged to the probate court, and that, in a general sense, the decisions of that court were conclusive and binding, especially upon parties, said: ‘*But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The court by chancery is always open to hear complaints against it, whether committed in pais or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceedings in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or*

decree, it will deprive them of the benefit of it and of any inequitable advantage which they have derived under it'. (Citing a large number of cases.)

“*Arrowsmith v. Gleason*, 129 U. S. 86, presented the question as to the jurisdiction of a probate court to make a sale of the lands there in controversy, and confirm sales reported by the guardian in said proceeding in probate. It was claimed there, as here, that the party complaining was bound by the judgment and orders of the probate court. The supreme court of the United States, however, says in its opinion: ‘But it is insisted that the circuit court of the United States, sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for, namely, a decree setting aside and vacating the orders of the probate court of Defiance county. If by this is meant only that the circuit court cannot by its orders act directly upon the probate court, or that the circuit court cannot compel or require the probate court to set aside or vacate its orders, the position of the defendants could not be disputed. *But it does not follow that the right of Harmening, in his lifetime or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction on the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But, whether that be so or not, it is difficult to perceive*

why the circuit court is not bound to give relief according to the recognized rules of equity as administered in the courts of the United States'."

In *Ocean Ins. Co. v. Fields*, 2 Story 59, Federal Case No. 10406, the Court overruled a demurrer to a bill in equity to set aside a judgment obtained by fraud. The case involved a suit on an insurance policy in which the Court held that the wilful concealment of the fact of the original fraud upon the action to recover the insurance on a lost boat was based upon sufficient facts to warrant the aid of equity since the fact of the original fraud if known to the defendant would have been a complete answer to the success of the suit. This case is cited with approval in *O'Brien v. Markham*, 17 F. Supp. 633, decided in the United States District Court of the Southern District of California, Central Division, where the plaintiff had been prevented from contesting a will, due to a conspiracy. The decision was adverse to the plaintiff because of the fact that not all of the parties were before the Court. However, the Court points out in the opinion that the conspiracy of the parties preventing the plaintiff from contesting the will would be a sufficient fraud to set aside the probate of such instrument.

A lengthy discussion of this question and a summary of the California law is set forth in a comment in 23 *Cal. Law Review*, page 79. The early case of *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, is discussed. There the Court points out clearly that where a fiduciary relationship is relied upon that the

facts constituting the fraud are extrinsic in their character, using the following language:

“But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to a suit, there was, in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and *con- nives at his defeat; or where the attorney regu- larly employed* corruptly sells out his client’s interest to the other side—these and similar cases which show that there never has been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing.” (Italics ours.)

The same line of reasoning is well recognized in California. See:

Sohler v. Sohler, 135 Cal. 323;

Simonton v. L. A. Trust & Savings Bank, 192 Cal. 651.

The rule is also recognized as applicable to a conspiracy to procure a sale on fraudulent claims.

Larne v. Friedman, 49 Cal. 278;

Bergin v. Haight, *supra*.

In the leading case of *Campbell-Kawannanako v. Campbell*, 152 Cal. 201, the Court says:

“The fraud here alleged, however, was extrinsic or collateral within the meaning of the rule. We are not confronted with a case where a party was in a former proceeding simply deprived by some fraudulent artifice or breach of fiduciary duty on the part of the prevailing party of his opportunity to be heard upon the issues there presented and determined, which is perhaps the most common instance of what is held to be extrinsic fraud. (See *Bacon v. Bacon*, 150 Cal. 577, (89 Pac. 317); *Sohler v. Sohler*, 135 Cal. 323, (87 Am. St. Rep. 98, 67 Pac. 282); *Aldrick v. Barton*, 138 Cal. 220, (94 Am. St. Rep. 43, 71 Pac. 169). The extrinsic character of the fraud is even clearer here than in such a case. The complaint is that the former proceedings were wholly sham, a mere fraudulent contrivance designed solely to give the appearance of legality and protection against attack to what was in fact nothing but the taking of plaintiffs’ property without consideration and without any authority of law, and that they were carried through by means of false representation to and concealments from the court as to the real facts and purposes of the transaction. *Such an imposition upon the jurisdiction of the court, to the injury of the absent property owners, from whom the nature of the transaction was concealed and who were wholly in ignorance thereof and could not have learned concerning the same from anything appearing on the face of the purported proceedings, by one who was their trustee for the proper administration of the affairs of the estate and the preservation of the*

property for legal distribution (*Bergin v. Haight*, 99 Cal. 52, (33 Pac. 760) and who was, moreover, as the natural guardian of two of the owners, under obligation to protect their rights, (*Sohler v. Sohler*, 135 Cal. 323, (87 Am. St. Rep. 98, 67 Pac. 282) clearly constituted under the authorities what is known as extrinsic fraud warranting equitable relief. (See *Bergin v. Haight*, 99 Cal. 52, (33 Pac. 760); *Tillman v. Thomas*, 87 Ala. 524, (13 Am. St. Rep. 42, 6 South. 151); *Fisher v. Wood*, 65 Tex. 199; *McCampbell v. Durst*, 73 Tex. 410, (11 S.W. 380); *Lawson v. Acton*, 57 N. J. Eq. 107, (40 Atl. 584); *Hoffman v. Wheelock*, 62 Wis. 436, (22 N.W. 713, 716); *Arrowsmith v. Gleason*, 129 U.S. 86, 9 (Sup. Ct. 237); *Wickersham v. Comerford*, 96 Cal. 433, (31 Pac. 358); *Curtis v. Schell*, 129 Cal. 208, (79 Am. St. Rep. 107, 61 Pac. 951); *Anderson v. Bank of Lassen County*, 140 Cal. 695, (74 Pac. 287); see, also, *Sohler v. Sohler*, 135 Cal. 323, (87 Am. St. Rep. 98, 67 Pac. 282); *Aldrich v. Barton*, 138 Cal. 220, (94 Am. St. Rep. 43, 71 Pac. 169.)”

The *Campbell* case has certain aspects exceedingly similar to the case at bar. There, the plaintiffs were non-residents as in the case at bar. There, it was decided they could not have learned from any notice that might have been given of a constructive character what the real purpose of the proceeding was. In the instant proceeding, because of the collusion of the parties involved the filing of the petition was just a sham, a mere fraudulent connivance designed solely to give appearance of legality, as in the *Campbell* case, *supra*.

In *Caldwell v. Taylor*, 218 Cal. 417, a general review of the law applicable is found. There again the Court points out that the fraud practiced on a party must be one which prevents a party from presenting all of his case to the Court.

Ocean Ins. Co. v. Fields, supra.

Again we call to the attention of the Court, as was said in the *Caldwell* case supra, that the plaintiffs were prevented from contesting any petition on behalf of the defendant bank within the period fixed by law, because of false statements made and vital information withheld as set forth and alleged in the second amended complaint. The plaintiffs had a right to rely upon the integrity of the defendant bank in its fiduciary position as an administrator, and by the filing of the petition seeking to compromise the defendant bank lulled the plaintiffs into security. Subsection 3, Sec. 1572, Civil Code, State of California; Subsection 1, Section 1573 Civil Code, State of California.

Also, in the case of *The Anglo California National Bank v. Kelly*, 117 Cal. App. 692 at page 694 of the opinion the Court says:

“ ‘Equity will relieve an injured party from the effect of a judgment procured by extrinsic fraud, mistake or inexcusable neglect which were not the result of negligence or laches on the part of the complainant. (*Sohler v. Sohler*, 135 Cal. 323 (87 Am. St. Rep. 98, 67 Pac. 282); *Bacon v. Bacon*, 150 Cal. 323 (89 Pac. 317); *Simonton v. Los Angeles T. & S. Bank*, 192 Cal. 651, 656, (221 Pac. 368); *Estate of Ross*, 180 Cal. 651, 658 (182

Pac. 752); *Clavey v. Loney*, 80 Cal. App. 20 (251 Pac. 232).’ (*Jeffords v. Young*, 98 Cal. App. 400, 404 (277 Pac. 163, 165).) ‘It is elementary that the courts of this state may in an equitable proceeding inquire whether a judgment valid on its face was obtained by fraud. Sometimes such judgments may be set aside, but even in cases where this relief cannot be had a court of equity may “*prevent an inequitable advantage being taken of it (the judgment) by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauded party.*” *Campbell-Kawannanako v. Campbell*, 152 Cal. 201, 208 (92 Pac. 184, 187); *Estate of Walker*, 160 Cal. 547 (36 L.R.A. (N.S.) 89, 117 Pac. 510).’ (*Title Inst. etc. Co. v. California Dev. Co.*, 171 Cal. 173, 208 (152 Pac. 542, 557).)’”

See also

Estate of Ross, 180 Cal. 651.

In *Lamm v. Kipp*, 145 N. W. 183, it was held that where a person, who because of a fiduciary relation to another, owed a duty to make a full disclosure of all matters pertaining to the trust, neglected to do so knowing that his failure to make such disclosure would result in another’s injury, and persisted in such silence throughout judicial proceedings, to the prejudice of the other and the advantage to himself, was guilty of extrinsic fraud as regarded the jurisdiction of equity to relieve against a judgment rendered in such proceeding.

See also the case of

Zaremba v. Woods, 17 Cal. App. (2d) 309.

From what has been said it must obviously follow :

1. That the fraud and collusion as alleged in the second amended complaint in the instant proceeding, was not an issue in the probate proceedings, being collateral and *extrinsic* to it;

2. That even if it was not collateral, it was *extrinsic*, because the heirs, due to the fiduciary relationship of the parties, were prevented from having their cases presented in Court.

Counsel for defendant Bank, during the argument in the Court below, insisted time and again, and in fact the entire premise of his argument was predicated upon the assertion that the only issue before the Probate Court was whether or not it was for the best interests of the heirs of the estate that the requested compromise be authorized, and that any fraud with reference to said issue would be intrinsic as distinguished from extrinsic. In making this argument counsel entirely overlooks the elementary and well established principle that the basis of the fraud now charged was not called to the attention of the Court, did not appear upon the face of the petition for the compromise, was unknown to the plaintiffs, being matters peculiarly within the knowledge of the defendants. and that said defendants fraudulently and negligently withheld said facts not alone from the plaintiffs but also from the Court. They now seek to take advantage of their own fraudulent and negligent conduct, which it is submitted they cannot do in a Court of equity.

We respectfully submit that the order of the lower Court granting the motion to dismiss said proceedings as to the defendant Bank of America National Trust & Savings Association, was erroneous and said motion to dismiss should have been denied and the Honorable Court should reverse said order with instructions to the lower Court to deny said motion to dismiss.

Dated, San Francisco,
March 27, 1942.

Respectfully submitted,

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No. 9945

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

VIRGINIA DAVIS HARTMAN and MARGARET
DAVIS RICHARDSON,

Appellants,

VS.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,

Appellee.

BRIEF FOR APPELLEE.

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Appellee.

BRIEF FOR APPELLEE.

**I. STATEMENT OF CASE AND OF QUESTIONS
INVOLVED.**

The appellants' statement of the case is inadequate. It does not attempt to give in concise fashion a true picture of the case, nor does it state the questions involved. And so we must make our own statement.

The appellants, to whom we will refer in this brief as the plaintiffs, have appealed from an order dismissing their second amended complaint made upon the motion of Bank of America N. T. & S. A., one of the defendants, the appellee on this appeal.

The allegations of the complaint relate to three distinct matters: first, the allegations relating to the

fraud¹ which is the gravamen of the plaintiffs' cause of action; second, the allegations relating to the extrinsic fraud upon which they base their claim that the orders of the probate court should be vacated; and, third, the allegations with respect to their discovery of the fraud upon which they base their claim that their cause of action is not barred by the statute of limitations.

Although the complaint is long, covering forty-five pages of the record, it can be accurately summarized in a few pages.

1. The allegations relating to the fraud which is the gravamen of the complaint.

The complaint alleges that Samuel Platt and John S. Sinai, two of the defendants, were attorneys for Martina Maxine Dole, referred to in this brief as Mrs. Dole, at the time of her death on February 3, 1934, and for many years prior thereto (R. 7, par. XI); that in May, 1933, Mrs. Dole entered into an agreement with Sinai under which she advanced him \$2500.00 so that he, as her agent and trustee, could purchase for her certain mining property; that Sinai purchased this property for \$18,500.00 and paid on account of the purchase price \$1850.00; that after Sinai acquired title to the property by paying the balance of the purchase price of \$16,650.00, which had been advanced by one Morse, he, pursuant to an

¹To be correct, we should insert the word "alleged" before the word "fraud" wherever the latter appears in this brief. But we have not done so, because we wanted to avoid this redundancy. This court will understand, of course, that whenever we refer to "fraud", we mean "alleged fraud".

agreement between himself, Platt and Morse, conveyed it to Sierra Consolidated Mines, Inc., hereafter referred to as Sierra Consolidated, another of the defendants, for shares of its stock which were then divided one-half to Morse and one-half to Sinai and Platt; that Platt, Morse and the Sierra Consolidated all had notice that Sinai had purchased the property as trustee for Mrs. Dole; that Sinai falsely represented to Mrs. Dole that he had been compelled to resell the property in order to obtain sufficient money to repay to her the \$2500.00 advanced by her plus a small profit of \$500.00; that the property so acquired by Sinai was reasonably worth the sum of \$3,000,000.00; that since the transfer of the property to the Sierra Consolidated, Sinai and Platt have received from it \$50,000.00 by way of dividends and attorneys' fees; and that Sinai and Platt hold this money and the Sierra Consolidated shares so received by them as trustee for Mrs. Dole (R. 7-20, pars. XI-XII).

The complaint also alleges that Mrs. Dole died intestate on February 3, 1934, leaving as her heirs the two plaintiffs, sisters, Harold F. Davis, a brother, one of the defendants, and Arthur A. Dole, the surviving husband, another of the defendants (R. 3, par. V); and that Davis and Dole are joined as defendants, because they would not consent to join as plaintiffs (R. 43, par. XXXV).

2. The allegations relating to extrinsic fraud.

The complaint alleges that on June 11th, 1934, the Superior Court of the State of California in and for the County of San Mateo appointed the Bank as

administrator of Mrs. Dole's estate (R. 3-4, par. VI);² that C. F. Humphrey and Luther Elkins, attorneys at law, who are joined as defendants, represented the Bank as such administrator (R. 6; par. X); that Dole, acting on behalf of himself and the plaintiffs, employed Humphrey and Elkins to represent the interests of the heirs of Mrs. Dole; that Humphrey and Elkins advised the Bank and Dole that the heirs of Mrs. Dole had a cause of action against Platt and Sinai arising out of the mining transaction (R. 22-24, par. XXIV); that thereafter the Bank made an agreement with Sinai under which it agreed that the estate's claim against Sinai for the alleged fraud should be compromised by the payment by Sinai of \$5000.00; that the Bank informed Humphrey and Elkins, who opposed the compromise, that if they did not prepare a petition to the Superior Court for an order authorizing the Bank as administrator to make the compromise, the Bank would employ other attorneys to do so (R. 25-26, par. XXV); that the Superior Court on May 7, 1936, upon a petition prepared by Humphrey and Elkins, made such an order (R. 26-27, par. XXVI); that the Bank as administrator, in consideration of the payment to it by Sinai of \$5000.00, then executed to him a release of all claims and Dole executed a similar release (R. 27-29, pars. XXVII-XXIX); and that on November 30,

²The complaint sometimes refers to the Bank as administrator and sometimes as special administrator. For example, the Bank is referred to in the former fashion on page 4 of the record, and in the latter on page 6. As the complaint indicates that the Bank was acting as administrator, not as special administrator, we have used the former term.

1936, the Superior Court made a decree distributing the estate and settling the account of the Bank, which decree ratified and approved the compromise (R. 4, par. VI; 29, par. XXIX; and 35, par. XXX(a)).

The complaint also alleges that Sinai was an officer and director of the First National Bank of Nevada, referred to herein as the First National; that Platt and Sinai were attorneys for it; that the First National was owned and operated by Transamerica Corporation, which also owned and operated the defendant Bank; and that by reason of these facts a fiduciary relationship existed between Platt and Sinai on one hand and the defendant Bank on the other, which relationship motivated the Bank in approving the compromise and petitioning the court for authority to make it (R. 32-34, par. XXXI(a)).

The complaint then alleges that shortly prior to the hearing of the petition for leave to compromise Humphrey and Elkins, upon being told by Dole that he was opposed to the compromise, replied that they agreed with him, but that it would be useless to oppose the Bank's petition; that in their opinion the compromise was illegal and would not be binding on the heirs; that Humphrey and Elkins then counseled Dole not to appear at the hearing and that they would represent the heirs; and that Dole for these reasons executed his release to Sinai (R. 35-37, par. XXXI(b)).

The complaint finally alleges that the order authorizing the compromise, the release executed by the Bank to Sinai, the release executed by Dole to Sinai,

and the decree settling the Bank's account and directing final distribution were procured by extrinsic fraud consisting in the following (R. 31-32, par. XXXI); that upon the hearings of the petition for leave to compromise and the petition for the settlement of the final account, Humphrey and Elkins and the Bank fraudulently represented to the Superior Court that the compromise was for the best interests of the estate (R. 39-40, par. XXXI(d)); that at said hearings the Bank and Sinai fraudulently concealed from the Superior Court facts material to the question whether or not the compromise should be effected and did not inform the court of the true nature and value of the estate's claim (R. 40-41, par. XXXI(d)); and that at the hearings Humphrey and Elkins and the Bank failed to call to the Superior Court's attention the true facts relating to the mining transaction, or the alleged relationship between Platt and Sinai on one hand and the Bank on the other, or the relationship between Humphrey and Elkins and the heirs, or the said reasons that actuated the Bank in making the compromise, or the fact that Humphreys and Elkins had advised Dole not to appear at the hearings and that they would represent him and the other heirs (R. 37-39, par. XXXI(c)).

The complaint then states that all the facts set forth in paragraph XXXII (that is the allegations respecting extrinsic fraud) "had a material bearing on the question and issue as to whether or no" the compro-

mise was for the best interests of the estate (R. 42, par. XXXIII).³

3. Allegations relating to the statute of limitations.

The complaint alleges that at all times mentioned in it, Mrs. Hartman, one of the plaintiffs, was a resident of New York and Mrs. Richardson, the other plaintiff, was a resident of New Jersey; that Mrs. Hartman did not discover the facts and circumstances with respect to the fraud which is the gravamen of the cause of action until April 21, 1938; that Mrs. Richardson did not discover them until July 31, 1938; and that the plaintiffs upon making such discovery “promptly caused said facts and circumstances to be investigated” and authorized this action to be commenced (R. 20-21, par. XXII).

The complaint also alleges that after Mrs. Dole’s death, the plaintiffs authorized Dole to employ Humphrey and Elkins to represent all of the heirs, including the plaintiffs; that Dole did not advise the plaintiffs “specifically” with regard to the mining transaction and the claim of the estate in connection with this transaction; that none of the facts alleged in the complaint concerning the acts of the Bank and Sinai in procuring the order authorizing the com-

³The complaint does not contain any paragraph numbered XXXII, but paragraph XXXIII, page 43, follows immediately after paragraph XXXI, commencing on page 31. But paragraph XXXIII alleges that the facts alleged in paragraph XXXII have a material bearing on the question whether the compromise should have been made. As there is no paragraph XXXII in the complaint, the context clearly indicates that paragraph XXXI was meant.

promise and the decree settling the final account were known to the plaintiffs at the time of the filing of this action; that the plaintiffs were lead to investigate such facts and circumstances by reason of certain recitals contained in Sinai's answer to the plaintiff's original complaint; and that as a result of such investigation, the plaintiff discovered the facts relating to the extrinsic fraud about January 28, 1939 (R. 21-22, par. XXIII; 22-23, par. XXIV; 42-43, par. XXXIV).

4. Prayer of the complaint.

The complaint alleges that heirs of Mrs. Dole have been damaged in the sum of \$3,000,000.00; and that the plaintiffs are entitled to one-third of this amount (R. 43, par. XXXVI).

The prayer is that a judgment in the sum of \$3,000,000.00 be entered in favor of the heirs of Mrs. Dole "against said defendants"; that it be adjudged that the plaintiffs are entitled to one-third of this amount; that "said defendants" account to the plaintiffs and the other heirs for the property in their possession belonging to Mrs. Dole; and that the orders authorizing the compromise and decreeing distribution, the Bank's release to Sinai and Dole's release to Sinai be adjudged void, and for general relief (R. 44-45).

5. Statement of questions involved on appeal.

1. Does the complaint state a claim against the Bank upon which relief may be granted?

2. Are the orders of the Superior Court authorizing the compromise and settling the Bank's final account *res judicata* against the plaintiffs' claim against it?

3. Assuming that these orders are *res judicata*, does the complaint state an extrinsic fraud justifying setting aside these orders?

4. Does the complaint show on its face that the plaintiffs' cause of action is barred by limitations?

II. SUMMARY OF ARGUMENT.

1. There is no allegation or suggestion in the complaint that the Bank participated in the fraud constituting the gravamen of the cause of action, or that it derived therefrom any benefit of any sort. Therefore, even if it be assumed that the Bank participated in the so-called extrinsic fraud, the plaintiffs are not entitled to recover any damages from the Bank for the fraud which is the gravamen of the cause of action, or to a decree that it holds any property in trust for them. It follows that the complaint does not state any claim for relief against the Bank.

2. The well established principle is that a probate order, like a judgment in a civil action, is *res judicata*, not only with regard to the issues actually decided, but with regard to all matters relevant to such issues that could have been disputed on the hearing.

All the alleged facts constituting the so-called extrinsic fraud might have been disputed upon the hearings in which the probate orders were made; that is, for example, the plaintiffs could have contended upon these hearings that the Bank and Sinai were fraudulently representing to the court that the compromise was for the best interests of the estate and were concealing from it material facts relating to the mining transaction and the value of the property.

As these alleged facts could have been disputed on the hearings, the probate orders, under the principle just stated, are *res judicata* with respect to them.

3. The rule in California is that an extrinsic fraud cannot be a fraud material to the issues decided by the court making the judgment or order under attack, but must be collateral or extrinsic to such issues, and it must consist in some strategy or device which operates to prevent a party from presenting his case to the court.

The complaint does not state an extrinsic fraud under this rule: first, because the alleged facts which it claims constituted such a fraud were all relevant to the issues decided by the probate court in making the orders under attack; and second, because the complaint does not allege any acts which prevented the plaintiffs from presenting their case to the court.

4. The complaint shows that the fraud which is the gravamen of the cause of action is barred by limitations. The applicable statute provides that an action for fraud is barred three years after "dis-

covery". A little less than six years have gone by since the alleged commission of this fraud and the filing of the first amended complaint in this action, which was the first complaint to name the Bank as a defendant. The law is that where an action for fraud is commenced more than three years after it occurred, the plaintiff must allege in his complaint, not only when the fraud was discovered, but also what his discovery was, how it was made and why it was not made sooner, so that the court will be able to determine from the complaint that he used due diligence to detect it.

The complaint in this case is totally devoid of any such allegations. Furthermore, it contains allegations showing that Dole had knowledge of the fraud. As Dole was the plaintiffs' agent, his knowledge must be imputed to them. And finally it shows that the plaintiffs could have obtained knowledge of the fraud by the slightest sort of inquiry. "Means of knowledge are the same thing as knowledge itself."

It follows that the fraud which is the gravamen of the complaint is barred by limitations, and that therefore the plaintiffs' entire case must fall.

III. ARGUMENT.

A. THE COMPLAINT DOES NOT STATE A CLAIM AGAINST THE BANK UPON WHICH RELIEF MAY BE GRANTED.

As indicated by our statement of the case, there are two frauds involved in this action, the first being

the fraud constituting the gravamen of the cause of action, and the second being the extrinsic fraud.

According to the complaint, the fraud which is the gravamen of the cause of action consisted in Sinai's fraud in purchasing the mining property for Mrs. Dole as her agent and trustee, and then fraudulently retaining the property for himself and his associates and misrepresenting to Mrs. Dole that he had been compelled to resell it. If the plaintiffs as heirs of Mrs. Dole are to secure any relief in this action, such relief will be based upon this fraud. But the complaint does not allege, or even suggest, that the Bank participated in any way whatever in this fraud, or secured any benefit by reason of it. On the contrary, the complaint shows that the Bank took no part in this fraud and obtained no benefit from it.

It is, of course, true that any one who participated in a fraud is liable for damages even though he personally derived no benefit from it. But it is likewise true that one who does not participate in a fraud or who does not with knowledge derive any benefit from it cannot be held liable for it (12 Cal. Jur. 774-775, sec. 65).

As the complaint does not allege that the Bank participated in or derived any benefit from the fraud which is the gravamen of the cause of action, the Bank cannot be held liable in damages, nor can it be charged as trustee of property never received by it.

But the orders of the probate court bar the plaintiffs' claim to relief. And so they attempt to allege

in their complaint what they call an extrinsic fraud, and state that the Bank participated in it.

The complaint's allegations with respect to the Bank's reasons for participating in the extrinsic fraud cast considerable light upon the bona fide character of the plaintiffs' claims against the Bank. The complaint alleges that the Bank was a subsidiary of Transamerica; that Sinai and Platt were the attorneys for another subsidiary of the same holding company; and that these facts created a "confidential relationship" between the Bank and Sinai and Platt which induced the Bank to engage in the fraud upon the probate court (R. 32-34, par. XXXI(a)).

It is hard to conceive of a weaker motive for committing the fraud charged against the Bank. The Bank not only had no real motive for taking part in misleading the probate court, but it had every reason not to do so. In carrying on its trust business, it depends, not only upon the trust and confidence of the public, but also of the courts handling estates. It would most certainly seriously injure its reputation with the probate courts if it engaged in gratuitously deceiving them as alleged in this case. Furthermore, it had a very strong financial reason for prosecuting the claim against Sinai. If it could have recovered for the estate the mining property asserted by the plaintiffs to be worth \$3,000,000.00, its commissions as administrator would have been very substantially increased. The Bank had every reason for not taking part in the extrinsic fraud; none for participating in it.

But if the plaintiffs could establish that the Bank took part in the extrinsic fraud and if we assume for argument's sake that this fraud would justify vacating the orders, still the plaintiffs could not base any claim for relief against the Bank on this ground. The only relief it could secure would be the setting aside of the orders of the probate court. It would then remain for the plaintiffs to establish the fraud which is the gravamen of their cause of action. But if we also assume for argument's sake that they will be able to establish this fraud, they will not be able to recover any damages against the Bank, or charge it as trustee with property never in its possession.

It follows that the complaint does not state **any** claim for relief against the Bank.

B. THE ORDERS AUTHORIZING THE COMPROMISE AND SETTLING THE BANK'S FINAL ACCOUNT ARE RES JUDICATA IN ITS FAVOR.

The plaintiffs argue their case as though they conceded that the orders were *res judicata* and that their only claim was that the complaint states an extrinsic fraud justifying setting aside the orders.

But at the same time, they claim that the orders were not conclusive with respect to matters raised in this action. For example, they maintain that they should be permitted to show in this action that the Bank and Sinai fraudulently misrepresented to the probate court that the compromise was for the best interests of the estate; and that the Bank and Sinai

concealed from the court material facts bearing on the question whether the compromise was in the estate's interest, including the value of the mining property and the alleged confidential relationship between the Bank and Sinai and between Humphrey and Elkins and the heirs. They say that they should be permitted to show these alleged facts as an extrinsic fraud.

Disregarding for the moment the point of extrinsic fraud, it is clear that all these matters bore upon the issue before the probate court, namely, whether the compromise was for the best interests of the estate; that the plaintiffs upon the hearings before the probate court could have shown them in support of their position that the compromise was not in the estate's interest; and that, therefore the orders of the probate court, under the well established principle, are *res judicata* in the Bank's favor with respect to all such matters.

The complaint alleges that Humphrey and Elkins, as attorneys for the Bank, prepared and filed in the Superior Court a petition for authority "to compromise the alleged indebtedness due from" Sinai "to the heirs" of Mrs. Dole for \$5000.00, and that, thereafter, on or about May 25, 1935, the Superior Court made an order approving "the requested and suggested compromise" between Sinai and the Bank, as administrator, "concerning the aforesaid cause of action then existing in favor of the heirs" of Mrs. Dole against Sinai (R. 26-27, par. XXVI).

The complaint then goes on to allege that after the Superior Court made this order, the Bank, as admin-

istrator, in consideration of the payment to it by Sinai of \$5000.00, executed to Sinai a release of all claims (R. 27-28, par. XXVII; 29, par. XXIX); and that on November 30, 1936, the Superior Court made an order distributing the estate and settling the account of the Bank as administrator, which decree ratified and approved the compromise (R. 4, par. VI; 29, par. XXIX; 35, par. XXXI(a)).

1. The order distributing the estate and settling the account is *res judicata*.

Sections 926 and 927 of the California Probate Code provide that when an administrator renders an account for settlement, the clerk shall set the same for hearing and give notice thereof; that any person interested in the estate may appear and file exceptions to the account and contest it; that "upon the hearing, the administrator may be examined on oath touching the account and the property and effects of the decedent and the disposition thereof"; and that all matters may be contested for cause shown.

And section 931 of this Code provides that the order settling the account is "conclusive against all persons interested in the estate", except that persons under legal disability may move to reopen the account at any time prior to final distribution. This saving clause has no application to this case.

It has been held in many cases that under these sections orders settling an account of an executor or administrator are *res judicata*. *Estate of Grant*, 131 Cal. 426, 428, 429, 63 P. 731, 732; *Estate of Mc-*

Dougald, 146 Cal. 191, 195, 79 P. 878, 879; *Estate of Rider*, 199 Cal. 742, 744, 251 P. 805, 806; *Ringwalt v. Bank of America*, 3 Cal. (2d) 680, 683-684, 45 P. (2d) 967, 969; and *Estate of Ware*, 20 A. C. 96, 99-100, 124 P. (2d) 12, 14.

Section 1021 of the Probate Code provides that an order of final distribution is conclusive. And it has been held that under this section such orders are *res judicata*. *Crew v. Pratt*, 119 Cal. 139, 149-150, 51 P. 38, 42, and *Manning v. Bank of California*, 216 Cal. 629, 634, 15 P. (2d) 746, 748-749.

The usual practice is to accompany an administrator's final account with a petition for final distribution and to combine in one decree the orders settling the account and directing distribution.

The complaint does not state explicitly whether this practice was followed in this case; but in view of its allegations we must infer that it was.

The first allegations of the complaint with regard to these proceedings are that "after due and proper proceedings had pursuant to statute * * * and on or about November 30th, 1936", the probate court made a decree of distribution (R. 4). Later the complaint alleges that the probate court entered a decree of "final distribution as hereinbefore more specifically alleged and referred to" ratifying and approving the compromise (R. 29). And then finally the complaint states that the probate court entered a decree of distribution "which contained an order approving and settling" the Bank's account as administrator and approving the compromise (R. 35).

In view of these allegations, it must be inferred that the account and the petition which accompanied it showed that Sinai pursuant to the order of compromise had paid the Bank \$5000.00; and that the probate court upon the hearing then made the order ratifying and confirming it.

Even though the complaint did not contain the allegation just mentioned that the decree was entered "after due and proper proceedings", it would have to be presumed upon the appeal that the notice of the hearing of the account and petition for distribution was properly given. *Abels v. Frey*, 126 Cal. App. 48, 53-54, 14 P. (2d) 594, 596; *McLaughlin v. Security First National Bank*, 20 Cal. App. (2d) 602, 607, 67 P. (2d) 726, 728. The elementary rule, of course, is that a pleading must be taken most strongly against the pleader. 21 Cal. Jur. 51, sec. 29.

There can be no doubt that the decree is *res adjudicata* in the Bank's favor.

2. The order authorizing the compromise is *res judicata*.

It will be recalled that the complaint alleges that a petition for an order authorizing the compromise was filed and that the Superior Court then made such an order (R. 26-27).

The complaint does not indicate the provisions of the law under which this petition was filed and the order obtained. Section 578 of the Probate Code provides that the probate court may authorize a compromise when it appears to be just and for the best interests of the estate; that the administrator must

file a verified petition showing the advantage of the compromise; and that the clerk shall give notice thereof.

The California law is that an administrator in the exercise of his common law powers may compromise a claim of the estate without being obligated to petition under section 578 for leave to do so, in which case his right to make the compromise must be approved upon the settlement of his account; but that if he does petition for and secures an order authorizing a compromise, the same is conclusive and fully protects him. Sec. 1908 California Code of Civil Procedure; 11b Cal. Jur. 288, sec. 874; and *Moulton v. Holmes*, 57 Cal. 337.

There can likewise be no doubt that the order authorizing the compromise is *res judicata* in the Bank's favor.

We must next consider the matters with respect to which an order settling an account or authorizing a compromise are conclusive.

3. The orders were conclusive with respect to all matters that could have been disputed on the hearings.

The rule in civil actions is that when issues are presented for adjudication, the parties to the proceeding must bring forward all claims or defenses which are relevant to the issues, or which might properly have belonged to the subject of the litigation; and the judgment is *res judicata*, not only with respect to what was decided, but also with respect to any matter which might have been disputed at the hearing; any matter

that could have been litigated; any matter litigable, as well as litigated. The policy underlying this rule is that the law favors an end of litigation; and therefore when parties are given an opportunity to present their claims or defenses they must avail themselves of it, and if they do not do so they are bound by the judgment. *Woolverton v. Baker*, 98 Cal. 628, 631-632, 33 P. 731, 732; *Quirk v. Rooney*, 130 Cal. 505, 511, 62 P. 825, 827; *Price v. 6th District Agricultural Association*, 201 Cal. 502, 509-512, 258 P. 387, 390; *Caminetti v. Board of Trustees*, 1 Cal. (2d) 354, 356, 34 P. (2d) 1021, 1022; *Andrews v. Reidy*, 7 Cal. (2d) 366, 370-371, 60 P. (2d) 832, 834; *Sutphin v. Speik*, 15 Cal. (2d) 195, 201-203, 99 P. (2d) 652, 655-656, 101 P. (2d) 497.

To abridge this brief, we have not reviewed these cases here, but have reviewed certain of them in the appendix. We hope the court will not infer from this that we consider the cases unimportant. On the contrary, we believe that they have a vital bearing on the decision of this case.

The rule in civil actions applies in probate proceedings. A probate proceeding is a proceeding *in rem*. When the statutory notice is given, all persons interested in the estate are called before the court; each of them becomes an actor in the proceeding; and the order is binding upon all of them, whether or not he appears and presents his claims. *Kearney v. Kearney*, 72 Cal. 591, 594, 15 P. 769, 769-70; *Hanley v. Hanley*, 114 Cal. 690, 694, 46 P. 736, 737; *Mulcahey v. Dow*, 131 Cal. 73, 77, 63 P. 158, 160; and *Estate of Allen*, 176 Cal. 632, 633-634, 169 P. 364, 365.

The order of the probate court like a judgment in a civil action, is *res judicata* with regard to any matter relevant to the issues that "might have been disputed" at the hearing, that "could have been raised." *Estate of McDougald*, 146 Cal. 191, 195, 79 P. 878, 879; *Ringwalt v. Bank of America*, 3 Cal. (2d) 680, 683, 684, 45 P. (2d) 967, 968-69; *Carr v. Bank of America*, 11 Cal. (2d) 366, 371, 374-375, 79 P. (2d) 1096, 1099; *Estate of Keet*, 15 Cal. (2d) 328, 333-334, 100 P. (2d) 1045, 1048; *Estate of Gump*, 16 Cal. (2d) 535, 549, 107 P. (2d) 17, 24.

In the *Estate of McDougald*, *supra*, the court held that an order settling an administratrix' current account was conclusive against objections made on the settlement of her later final account that she in violation of a statute had purchased a claim against the estate pending its administration. The court said (146 Cal. 195, 79 P. 879):

"A judgment or order of a court having jurisdiction is conclusive of all matters involved *which might have been disputed at the hearing*, although no objection was in fact made. This rule applies to the settling of accounts the same as to any other proceeding. (*Estate of Grant*, 131 Cal. 426; *Estate of Bell*, 142 Cal. 102.)"⁴

In the *Estate of Keet*, *supra*, a trustee filed a petition for an order authorizing it to sell shares held by it in a trust created by a decree of distribution for the benefit of the decedent's widow. There was grave doubt whether under the decree the trustee had

⁴All emphasis by italics are ours unless otherwise indicated.

a power of sale. The petition for leave to sell did not allege that there was any doubt with regard to the trustee's power of sale, nor did it allege the existence of any emergency justifying a deviation from the provisions of the trust. The probate court made an order authorizing the trustee to sell the shares and reinvest the proceeds. The trustee then filed an account. The widow filed objections to it upon the ground that the trustee had no power of sale and that therefore it was responsible for the loss arising out of the sale of the shares. The probate court surcharged the trustee's account upon the ground that the petition for leave to sell did not present the issue of the trustee's power and that therefore the order authorizing the sale was not *res judicata*. The Supreme Court held that the widow upon the hearing of the petition could have presented her contention that the trustee did not have any power to sell, and that therefore the order authorizing the sale was *res judicata*. It said (15 Cal. (2d) 328, 333-334, 100 P. (2d) 1045, 1048):

“The petition for instructions and authority to sell was a distinct and independent proceeding, and the order of the court was appealable. (Prob. Code, sec. 1240.) No appeal was taken, and consequently it became a final determination of the matters adjudged, with the force and effect of a final judgment. (See *Security etc. Bank v. Superior Court*, 1 Cal. (2d) 749 (37 Pac. (2d) 69; *Estate of Davis*, 151 Cal. 318 (86 Pac. 183, 9 Pac. 711, 121 Am. St. Rep. 105); *Baldwin v. Stewart*, 218 Cal. 364 (23 Pac. (2d) 283).) * * *

The fact that the petition did not specifically request a construction of the decree of distribu-

tion, but simply alleged that petitioner had concluded that it was for the best interests of the estate to sell and diversify investments, is not controlling. Since the trustee's powers were derived from the decree of distribution, the meaning and effect of its provisions were necessarily in issue in the proceeding. The scope of a judgment, when collaterally attacked, is not limited to the factual or legal points expressly urged by counsel or considered by the court; *it extends to matters which could have been raised and considered in the particular proceedings under the particular pleadings.*"

There is no need to review the other authorities. There can be no doubt that the rule is that in a probate proceeding, as well as in a civil action, it is incumbent on the parties to present all the claims and demands which are relevant to the issues, or that properly belong to the subject of the litigation, and that the judgment or order is *res judicata*, not only with respect to the matter actually decided, but also with regard to all other matters that could have been litigated.

The application of this rule to the case at bar is obvious. The issue upon the hearing of the petition for leave to compromise, and the issue upon the hearing of the Bank's petition to settle its final account and for final distribution was the same, namely, whether the compromise was for the best interests of the estate. The allegations of the complaint which it calls the extrinsic fraud were all relevant to this issue. For example, the allegations that the Bank and Sinai fraudulently misrepresented to and concealed from the

court facts bearing on the advisability of the compromise, and that the Bank and Sinai concealed from the court the alleged confidential relationship between them, all bore upon this issue. The complaint itself admits that this was so. Paragraph XXXIII of the complaint (R. 42) states that the allegations of extrinsic fraud in paragraph XXXI (incorrectly referred to as paragraph XXXII) had a “material bearing on the question and issue as to whether or no the compromise was for the best interests” of the estate.

As these allegations were relevant to the issue raised on these hearings, they could and should have been raised and considered at that time.

It follows that under the principle established by the authorities cited the orders are *res judicata* in the Bank’s favor against all the matters the plaintiffs seek to show in support of their claim that the orders should be set aside.

But let us now consider the plaintiffs’ position from another point of view, that is their claim that the allegations of the complaint state an extrinsic fraud.

C. THE COMPLAINT DOES NOT STATE AN EXTRINSIC FRAUD JUSTIFYING VACATING THE ORDERS.

It is, of course, true that the decision of this point, and the other points involved on this appeal, is controlled by the rules established by the state courts. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817.

The law of California with respect to extrinsic fraud is well established.

The rule is that a court will not set aside a judgment or decree upon the ground that it was procured by perjury, misrepresentation or the concealment of pertinent facts; but it will only set aside a decree upon the ground that it was procured by extrinsic fraud.

An extrinsic fraud is one which does not go to the merits of the proceedings in which the judgment or decree under attack was made, but is extrinsic or collateral to that proceeding; and it consists in some fraudulent artifice or scheme, the effect of which is to prevent a party from presenting his case to the court. *Pico v. Cohn*, 91 Cal. 129, 25 P. 970, 27 P. 537; *Ringwalt v. Bank of America*, supra; *Carr v. Bank of America*, supra; and *McLaughlin v. Security National Bank*, supra.

But as we pointed out in our discussion of the preceding point, the allegations of the complaint constituting what it calls an extrinsic fraud are nothing more than allegations of fact relevant to the issue passed on by the probate court, namely, the issue whether the compromise was for the best interests of the estate. These statements are not allegations of some fraudulent artifice or scheme, the effect of which was to prevent the plaintiffs from presenting their case to the probate court. They are, therefore, allegations of an intrinsic, not an extrinsic fraud, and so do not justify setting aside the orders.

Let us now review the cases laying down the pertinent rules, and then let us apply them more in detail to the allegations of the complaint.

1. The authorities relating to extrinsic fraud.

Pico v. Cohn, supra, is a leading case in this state. The complaint in this action alleged that in a previous action between the same parties the defendant had secured a judgment by bribing a witness to commit perjury. The prayer was that the previous judgment be vacated. The court, in affirming a judgment dismissing the complaint after an order sustaining a demurrer, said (91 Cal. 129, 133-34, 25 P. 970, 971, 27 P. 537):

“That a former judgment or decree may be set aside, and annulled for some frauds there can be no question; *but it must be a fraud extrinsic or collateral to the questions examined and determined in the action.* And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is, that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or pur-

posely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. (*United States v. Throckmorton*, 98 U. S. 65, 66 and authorities cited.)

In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there."

The plaintiffs are laboring under the misconception that there is a distinction between a positive perjury and a fraudulent concealment of facts relating to the issue before the court. Such concealment is not an extrinsic fraud any more than positive perjury is extrinsic. Neither is "collateral" to the question to be decided. Both have a bearing on the issue and are intrinsic.

The plaintiffs apparently also believe that the fact that a fiduciary relationship existed between the Bank as administrator and the heirs would justify this court in setting aside the orders. If this were the rule, a probate order would have no stability whatever. When an administrator commences any proceeding in the probate court, as for example a proceeding to secure an order confirming a sale, or to authorize a compromise, or to settle an account, he is instituting a proceeding in rem. All persons interested in the estate become actors in the proceeding, and are required to present whatever claims they may have with regard to it; and the order made in it is conclusive against

them, whether or not they appear and present their claims. In such a proceeding, the administrator is not the fiduciary of the heirs; he is their adversary. When he files his account, for example, he in effect notifies the heirs that if they have any objection, they must make it, and that if they do not do so, they will be bound by the order of settlement. The situation is the same as though a trustee of a voluntary trust had brought suit in equity against his beneficiaries to settle his account.

The fact that there is a confidential relationship between the administrator and the heirs does not mean that the orders obtained in the course of the administration of the estate have not the effect of *res judicata*, or that they can be set aside except upon the same ground that any judgment or order may be set aside. This is demonstrated by many cases, a few of which we will now review.

In *Ringwalt v. Bank of America*, supra, the complaint alleged that the Bank as executor and then as trustee had been guilty of fraud and neglect in holding shares of the Bank and Bancitaly Corporation and later shares of Transamerica for which the other shares were exchanged; that the probate court had made orders settling the Bank's final account as executor, and its current accounts as trustee; that the accounts filed by it did not show the appraised value of the shares or their depreciation; and that the Bank had not given any special notice of the hearings of its accounts to the plaintiffs, or caused a guardian *ad litem* to be appointed for the minor plaintiffs. The

fact that a fiduciary relationship existed between the Bank and the claimants against it made no difference in the case. The court, in affirming an order sustaining the demurrer to the complaint held, first, that the orders settling the Bank's accounts were *res judicata* in the Bank's favor against the claims of fraud and negligence; and, second, that the complaint failed to state an extrinsic fraud justifying setting aside these orders. It is the latter point in which we are interested at this point. The court said with regard to it (3 Cal. (2d) 680, 683-684; 45 P. (2d) 967, 968-69):

“We are therefore brought to the point where it is necessary to determine whether the cause of action attempted to be stated alleges facts constituting extrinsic fraud authorizing the court to set aside the decree and compel the executor to make restitution. Extrinsic fraud has been many times defined and quite recently in the case of *Caldwell v. Taylor*, 218 Cal. 471 (23 Pac. (2d) 758, 88 A. L. R. 1194), we had occasion to refer to the definition contained in the leading case of *United States v. Throckmorton*, 98 U. S. 61 (25 L. Ed. 93), to the effect that it consists of some ‘fraud practiced directly upon the party seeking relief against the judgment or decree’ by which ‘*that party has been prevented from presenting all his case to the court.*’ And we also set forth a succinct statement from *Clavey v. Loney*, 80 Cal. App. 20 (251 Pac. 232), as follows: ‘The extrinsic fraud which alone will warrant a court of equity in setting aside a judgment or decree consists of such fraud *as prevents a real trial of the issues involved in the case*, like conduct which prevents the injured party from receiving notice of the ac-

tion or which causes the absence of necessary witnesses.’ ”

Carr v. Bank of America, supra, presented substantially the same claim as the *Ringwalt* case. The decedent's will named the Bank as both executor and trustee, and the plaintiff claimed that the Bank as executor had fraudulently and negligently held shares of Transamerica. There was, however, this important difference between the cases. The *Ringwalt* case was decided upon demurrer to the plaintiffs' complaint. The *Carr* case was decided after trial. At the trial it appeared that the widow and two minor children of the deceased, one of whom was the plaintiff, had executed an agreement suggested by the trust officer of the Bank, and drafted by its attorney, providing that the shares should be distributed to the Bank as trustee in lieu of cash bequests given it under the will. The contention was that the Bank had secured this agreement in order to prevent the heirs from presenting their claims of negligence and fraud upon the hearing of the Bank's final account and petition for distribution, and that therefore the Bank's act in securing the agreement and in concealing from the beneficiary and the probate court the alleged fraud and negligence amounted to an extrinsic fraud.

The court held that these facts did not constitute an extrinsic fraud; and also that if there was any fraud in the procurement of the agreement, it was within the issues presented to the probate court upon the application for distribution in accordance with the

agreement and was therefore intrinsic. The court said (11 Cal. (2d), 366, 372-73, 374, 79 P. (2d), 1096, 1110-1101):

“The trial court found that the bank did not exercise any dominion or control over the parties interested to procure the execution of the agreement, and this finding finds support in the record. The extrinsic fraud relied upon by the appellant in this regard is therefore necessarily limited to the procurement by the respondent bank of the execution of the agreement by the minor beneficiary and *the nondisclosure and concealment* from him of the possibility that the executor’s account might be surcharged upon a claim of negligence and fraud in the administration of the estate by the bank, together with the presentation of such agreement to the probate court *with no disclosure to the court* of the bank’s interest adverse to the sale of the shares of Transamerica stock during the administration of the estate * * *.

“Moreover, the agreement itself was presented to the probate court for its approval and for its incorporation into the decree of distribution, and this fact compels the conclusion that *any fraud in its procurement, now alleged, was necessarily within the issues of its fairness and the advisability of the approval of such agreement by the probate court*, and, even if fraud were proven, it would constitute intrinsic, in contradistinction to extrinsic, fraud. In *Caldwell v. Taylor*, 218 Cal. 471 (23 Pac. (2d) 758, 88 A. L. R. 1194), we held: ‘It also seems to be the rule that the fraud alleged must not be the fraud which is in effect the issue in controversy, the fraud upon which the cause of action in the former suit was based.’ In the in-

stant case, not only was the issue of whether the bank fraudulently retained the shares during administration presented to the probate court upon the executor's account, *but also the question of whether it fraudulently secured the agreement upon the petition for final distribution.* It follows that the order settling the bank's account as executor and for final distribution was conclusive with regard to its acts as executor."

The application of this to the case at bar is, of course, obvious. The agreement of compromise was presented to the probate court on two occasions, first, when it made the order authorizing the compromise, and next, when it made the order settling the account. If there was any concealment of any material facts relating to the issues whether the compromise was for the best interests of the estate, or whether there had been any fraud in the procurement of the agreement, such concealment was an intrinsic, not an extrinsic, fraud. And these questions were necessarily within the issue of the "fairness and the advisability of the approval" of the compromise presented upon both hearings; and therefore the alleged fraud was intrinsic.

In *McLaughlin v. Security National Bank*, supra, the complaint alleged that the defendant as trustee of a testamentary trust had negligently invested funds of the trust in mortgage participating certificates inadequately secured and void because issued without a permit of the Corporation Commissioner. In affirming an order sustaining a demurrer to the complaint, the

court held that the orders settling the Bank's accounts as trustee were conclusive and that the complaint did not state an extrinsic fraud justifying vacating these orders. At said (20 Cal. App. (2d) 602, 605, 606, 67 Pac. (2d) 726, 727-28):

“‘Extrinsic fraud’ is best defined both negatively and affirmatively. Negatively, it may be said not to be fraud which goes to the merits of the judgment. Affirmatively, it is fraud which has prevented the cause from having been fully considered on its merits. * * *

Tested by this definition, as we find it applied, the complaint does not allege facts showing extrinsic fraud. In part the allegations show fraud which is intrinsic: it went to the merits of the reports. In this respect we note that each report, other than the first, contains this statement: ‘The details of all its acts and of these transactions and the securities and or properties in which the trust estate is now invested are as set forth herein. All investments made for said trust are in securities authorized by law or by the terms of said trust, have been carefully selected and made for the purpose of serving the best interests of this trust and all parties interested therein, and on none of them has the trustee made any profit, direct or indirect.’ This statement was false, the complaint avers, and was known to the trustee to be so, and it was made to bring about the result achieved, the confirmation of the report. To the same end, the complaint points out, the report was silent about the lack of a permit to issue certificates of participating interests, and made no mention of the character or value of the property standing as security back of the certificates. * * *

In approving the acts of the trustee in making the investments it had reported, the probate court necessarily had open before it the question of the legality of the investments and the matter of their economic merit as well. The approval of these investments, requested by the trustee, presented for determination at least these two issues. *The false representations and lack of complete revealment on these issues*, therefore, went to the merits of the cause submitted for judgment; they constituted intrinsic, not extrinsic fraud."

There is no need to consider any other cases. No principle of law is better established in this state than that a judgment or decree will not be set aside upon the ground of intrinsic fraud, such as perjury, misrepresentation or concealment of pertinent facts; but that a judgment or decree can only be set aside upon the ground of an extrinsic fraud, that is a fraud not going to the merits of the proceeding in which the order or decree was made, and consisting in some fraudulent scheme, the effect of which is to prevent a party from presenting his case to the court.

Nor is there any need to extend this brief by a detailed consideration of the cases cited by the plaintiffs in support of their claim that their complaint states an extrinsic fraud. There is nothing in these cases that qualifies or impairs the principle established by the recent cases.

2. The application of the extrinsic fraud rule to the complaint.

1. The complaint alleges that upon the hearing of both the petition for leave to compromise and the peti-

tion for the settlement of the final account, Humphrey and Elkins and the Bank fraudulently represented to the Superior Court that the compromise was for the best interests of the estate (R. 39-40, par. XXXI(d)). There is no need for us to argue the proposition that such alleged fraudulent representations would constitute an intrinsic fraud.

2. The complaint also alleges that at these hearings the Bank and Sinai fraudulently concealed from the court facts material to the question whether or not the compromise should be effected and did not inform the court of the true nature and value of the estate's claim (R. 40-41, par. XXXI(d)). The cases we have reviewed demonstrate that concealment of material facts is just as much an intrinsic fraud as misrepresenting such facts. The issue before the probate court on both hearings was whether the compromise was for the best interests of the estate. If it was induced to make its orders by the fraudulent concealment of facts, such fraud was intrinsic.

3. The complaint alleges that at the hearings Humphrey and Elkins and the Bank did not call to the court's attention the alleged confidential relationship between Platt and Sinai on one hand and the Bank on the other, or the fact that the Bank in misleading the probate court was actuated by this alleged relationship between it and Platt and Sinai (R. 38, par. XXXI(c)).

The fact is that the complaint does not allege the existence of a confidential relationship of any sort be-

tween the Bank and Sinai and Platt, and that if it had, the failure of the Bank to disclose it upon the hearings would at most have constituted an intrinsic fraud. The complaint alleges that Sinai was an officer and director of the First National Bank of Nevada; and that Platt and Sinai were attorneys for it; that the First National was owned and operated by Trans-america, which also owned and operated the defendant Bank, and that by reason of these facts, a fiduciary relationship existed between Platt and Sinai on one hand and the defendant Bank on the other, which relationship motivated the Bank in approving the compromise and petitioning the court for authority to make it (R. 32-34, par. XXXI(a)).

These allegations do not show a confidential relationship between the Bank and Platt and Sinai. If the Bank had employed Platt and Sinai, then there would have been the confidential relationship of attorney and client between them. But if one subsidiary of a holding company employs an attorney, it does not mean that all the subsidiaries of the same holding company have employed him. The relationship of attorney and client cannot be created without a contract of employment; the complaint is devoid of any allegation that the Bank employed Sinai and Platt as its attorneys.

But even though a confidential relationship had existed between the Bank and Sinai and Platt and the existence of this relationship had induced the Bank to mislead the probate court, and even though the Bank had concealed the existence of this relationship

and the reasons for its fraud from that court, these facts would not have constituted an extrinsic fraud. They would have been relevant to the issue before that court, and would not have prevented the plaintiffs from presenting their case to it, and so would not have constituted an extrinsic fraud.

While discussing this point, let us say again that when the plaintiffs state that the Bank was motivated to participate in the alleged deception of the probate court because of the so-called confidential relationship between itself and Sinai and Platt, they show how weak their case against the Bank really is. As we have said, the complaint shows that there was no relationship of any sort between the Bank and Sinai. Even though the facts alleged did create some sort of tenuous relationship, the Bank had every reason, both financial and moral, not to participate in misleading the probate court.

4. The complaint states that Humphrey and Elkins and the Bank did not explain to the probate court at the hearings that Humphrey and Elkins had been employed to represent the heirs upon the administration of the estate (R. 38, par. XXXI(c)). There was nothing improper on the part of Humphrey and Elkins in representing both the administrator and the heirs. 11b Cal. Jur. 492-493 says:

“And the fact that attorneys for a representative are acting as attorneys for an heir seeking to determine his rights does not of itself incapacitate the representative or indicate that he is unfaithful. In a controversy between heirs upon a matter

in which the representative has no interest and which does not affect his relation to the estate, the attorney for the latter violates no obligation to his client by acting for one of the heirs. Correlatively and for the same reason the representative violates no obligation to his trust by continuing to retain such attorney.”

This fact, therefore, does not tend to show an extrinsic fraud. If the plaintiffs are to base their claim that they have alleged an extrinsic fraud upon the relationship between Humphrey and Elkins and themselves, they should have alleged much more than that these attorneys represented both the Bank as administrator and the heirs; they should also have alleged that these attorneys conspired with the Bank to fraudulently sell out their interests. As we are about to show, they have not done this. Furthermore, the complaint shows that Dole acting for himself and as agent of the plaintiffs employed Humphrey and Elkins, and that he knew that they were representing the Bank as administrator (R. 22-25, par. XXIV). Dole’s knowledge must be imputed to the plaintiffs for whom he was acting.

5. The complaint alleges that Humphrey and Elkins were the attorneys for the Bank (R. 6, par. X); that Dole, acting on behalf of himself and the plaintiffs, employed Humphrey and Elkins to represent them in the administration of the estate; that at that time he, on behalf of himself and the plaintiffs, entered into a written contract with these attorneys under which he agreed to pay them one-half of all

moneys recovered from Platt and Sinai; that Humphrey and Elkins advised both Dole and the Bank that in their opinion Mrs. Dole's heirs had a cause of action against Sinai and Platt (R. 22-24, par. XXIV); and that shortly prior to the hearing of the petition for leave to compromise Humphrey and Elkins, upon being told by Dole that he was opposed to the compromise replied that they agreed with him, but that it would be useless for him or any one else to oppose the petition as the probate court "would not listen seriously to any of the heirs" who might oppose it, but would grant it irrespective of any such opposition; that Humphreys and Elkins then advised Dole that in their opinion the compromise was illegal and would not be binding on the heirs; that they counselled him not to appear at the hearing "as he would accomplish nothing by so doing" and that they would represent the heirs; that thereafter Humphrey and Elkins furnished Dole "a written opinion to the effect that said compromise was not binding on the heirs * * * as far as the defendant, Samuel Platt, was concerned"; and that Dole relied upon these statements of Humphrey and Elkins, and as a result thereof did not appear at either of the hearings (R. 35-36, par. XXXI(b)).

In a subsequent paragraph the complaint alleges that upon the hearing of both petitions, Humphrey and Elkins and the Bank fraudulently represented to the probate court that the compromise was for the best interests of the estate (R. 39-40, par. XXXI(d)), and that Humphrey and Elkins and the Bank failed

to call to the court's attention material facts relating to the mining transaction, and the alleged relationship between the Bank and Sinai and Platt, and the relationship between Humphrey and Elkins and the heirs (R. 37-39, par. XXXI(c)). The complaint also states that under the decree settling the Bank's account and directing final distribution there was paid Humphrey and Elkins under their said contract of employment \$2500.00, one-half of the amount paid by Sinai (R. 29-30, par. XXIX).

These allegations do not constitute an extrinsic fraud. The complaint does not allege or suggest that the Bank instructed or requested Humphrey and Elkins to advise Dole not to appear at the hearing, nor that there was anything in the nature of a conspiracy between the Bank and Humphreys and Elkins to induce Dole not to appear at the hearing. And there is no suggestion in the complaint that Humphrey and Elkins were acting fraudulently in giving this advice to Dole. On the contrary, this paragraph of the complaint (par. XXXI(b)) states in effect that these lawyers in giving this advice to Dole were acting in good faith. It alleges that Humphrey and Elkins agreed with Dole's statement that the compromise was not for the best interests of the estate. This certainly does not indicate any intention to mislead him. The paragraph also alleges that Humphrey and Elkins advised Dole that the compromise was illegal and would not be binding on the heirs, and that they then gave him a written opinion to the effect that the compromise was not binding on the

heirs so far as the defendant, Platt, was concerned. There is no suggestion of fraud in this. On the contrary, it suggests that Humphrey and Elkins on one hand and Dole on the other were seeking to play a smart game in the transaction; that they were seeking to obtain from Sinai his \$5000.00, believing that the heirs were not bound by the settlement and that they would be able to proceed against Platt. They were hoist on their own petard. At least so far as the Bank is concerned, their smart trick has not worked. But the essential point is that the complaint does not suggest that Humphrey and Elkins in giving this written opinion to Dole were acting in collusion with the Bank for the purpose of preventing Dole from presenting his case upon the hearings.

This paragraph of the complaint (par. XXXI(b)) also alleges that Humphrey and Elkins advised Dole not to appear at the hearing and that he relying on their advice did not appear. The same thing is true of these allegations as of the other allegations of this paragraph, that is, that the complaint does not allege that Humphrey and Elkins in giving this advice were doing so in collusion with the Bank for the purpose of preventing Dole from appearing at the hearing and presenting his case to the court. On the contrary, these allegations, when taken into consideration with the other allegations of this paragraph, suggest that Humphrey and Elkins gave this advice as part of the smart trick being concocted by them and Dole to secure Sinai's \$5000.00 and then proceed against Platt.

It is true that paragraph XXXI(d) (R. 39-41) alleges that Humphrey and Dole and the Bank fraudulently represented to the court that the compromise was for the best interests of the estate and neglected to call to the probate court's attention material facts relating to the claim and the relationship of the parties. But as we have pointed out, these allegations are allegations of an intrinsic fraud. They relate to matters relevant to the issues before the probate court, and could not have operated to prevent the plaintiffs from presenting their case to that court.

The complaint does not allege why Humphrey and Elkins joined with the Bank in making these alleged misrepresentations to the court, but we can infer from the allegations of paragraph XXXI(b) that Humphrey and Elkins did this in order to carry out the scheme between them and Dole to secure Sinai's money and then to hold Platt.

Whatever the reason for this alleged conduct on the part of Humphrey and Elkins, the fact is that the complaint contains no allegation that they and the Bank conspired to prevent the plaintiffs from trying their claim in the probate court.

If the plaintiffs had intended to charge these lawyers with corruptly selling out their clients, a most contemptible form of fraud, they should have said so in their complaint clearly and unequivocally. They have not done this. A pleading must be construed most strongly against the pleader, and a party cannot ask a court to infer a fact from his pleading,

particularly fraud, but must allege it positively and directly.

The complaint under consideration is a second amended complaint. We are certainly entitled to presume that if the plaintiffs had felt that they could possibly prove such a conspiracy between the Bank and these lawyers, they would have so alleged in their third complaint. The fact that they did not do so is conclusive.

6. This completes our analysis of the allegations of the complaint.

It is clear that the complaint's allegations relate to matters that were material to the issue before the probate court, and could not have prevented the plaintiffs from presenting their case to that court. It follows that the complaint does not state an extrinsic fraud, and that the trial court's order dismissing it must be affirmed.

D. THE COMPLAINT SHOWS ON ITS FACE THAT THE PLAINTIFFS' CAUSE OF ACTION IS BARRED BY LIMITATIONS.

The plaintiffs state that the Bank did not make this point with any energy in the trial court, and they suggest that the Bank will not urge the point seriously on this appeal (Plts. B. 5). The contrary is the case. The Bank relied strongly on the point in the trial court, and urges the point on this appeal as a very good reason why the order of the trial court should be affirmed.

The applicable statute of limitations is subdivision 4 of section 338 of the California Code of Civil Procedure, providing that an action for fraud is barred in three years, but that the cause of action in such case is not deemed "to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud".

The record on this appeal contains only the second amended complaint which was filed on November 16, 1940. But the attorneys for the parties have stipulated that the clerk of the District Court shall certify and transmit to this court copies of the original complaint and the first amended complaint. In view of the contention under discussion we know this court will want this done in order to have the facts.

The original complaint shows that it was filed in the state court on September 12, 1939; but it also shows that it did not name the Bank as a defendant; that it stated that the decree settling the final account had been duly made; that it did not mention the order authorizing the compromise; and that it contained no allegations upon which a claim was based that these orders should be set aside.

The first amended complaint was filed in the District Court on February 20, 1939. It named the Bank as a defendant and mentioned the orders and attempted to state grounds for setting them aside.

It will be recalled that the mining transaction between Sinai and Mrs. Dole giving rise to the claim asserted in this case took place in May of 1933, and

that Mrs. Dole died in February, 1934. It thus appears that more than five years went by from the time the fraud which constituted the gravamen of the cause of action took place until the filing of the original complaint, and that a little less than six years transpired between the commission of this fraud and the filing of the first amended complaint naming the Bank as a defendant.

When a plaintiff brings an action for fraud more than three years after the fraud occurred, the rules of pleading are well established. The plaintiff must allege, not only when he discovered the alleged fraud, but also what it was, how it was made and why it was not made sooner, so that the court will be able to determine from his complaint that he used due diligence to detect it. The circumstances of the discovery must be fully stated, because if there has been any lack of diligence in making discovery, the action is barred. And the complaint must also show that the fraud was committed under circumstances that the plaintiff would not be presumed to have any knowledge of it, "as that it was done in secret or was kept concealed." And "means of knowledge are the same thing as knowledge itself." The law is stated in *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698, 701-703, 16 P. (2d) 268, 269-270, as follows:

"The rules of pleading governing the statement of a cause of action for fraud committed more than three years prior to the commencement of suit are now well settled. They are admirably stated in the leading case of *Lady Washington*

C. Co. v. Wood, 113 Cal. 482, 486 (45 Pac. 809), from which we quote:

‘The right of a plaintiff to invoke the aid of a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed is an exception to the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. * * * “Discovery” and “knowledge” are not convertible terms, and whether there has been a “discovery” of the facts “constituting the fraud” within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. * * * *He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret or were kept concealed.*’ * * *

“The following appears in Wood v. Carpenter, 101 U. S. 135, 140 (25 L. Ed. 807): ‘In this class of cases the plaintiff is held to stringent rules of pleading and evidence, “and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation were discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.” * * * A general allegation of ignorance at one time and of knowledge at another (is) of no effect. If the plaintiff made any

particular discovery, it should be stated *when it was made, what it was, how it was made, and why it was not made sooner.* * * * A party seeking to avoid the bar of the statute on account of fraud must aver and show that *he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it.* * * * *There must be reasonable diligence: and the means of knowledge are the same thing in effect as knowledge itself. The circumstances of the discovery must be fully stated and proved* (court's italics), and the delay which has occurred must be shown to be consistent with the requisite diligence.' ”

Under the rule of the *Scarborough* case the fraud which constitutes the gravamen of the cause of action is barred by limitations.

The complaint alleges that at all times mentioned in it, Mrs. Hartman, one of the plaintiffs, was a resident of New York and that Mrs. Richardson, the other plaintiff was a resident of New Jersey; that Mrs. Hartman did not discover the facts constituting the fraud which is the gravamen of the cause of action until April 21, 1938, and that Mrs. Richardson did not discover them until July 31, 1938; and that the plaintiffs upon making such discovery promptly caused the facts and circumstances to be investigated and authorized this action to be commenced (R. 20-21, par. XXII).

It is perfectly obvious that these allegations do not meet the requirements of the rule. They state when

the alleged discovery was made; but the complaint is totally devoid of allegations as to what the discovery was, how it was made and why it was not made sooner; and there is nothing in the complaint showing that the plaintiffs used diligence to detect the fraud, or that the delay was consistent with the diligence the law demands.

The complaint is not only defective because it fails to show these essential facts, but it is also defective because it shows positively that knowledge of the fraud should be imputed to the plaintiff.

The complaint alleges that Dole immediately after Mrs. Dole's death on February 3, 1934, advised the plaintiffs that there were certain matters that "would require attention and likewise the services of an attorney * * * to represent" the heirs, and that he "was about to procure the services" of Humphrey and Elkins "to represent him as an heir at law" of Mrs. Dole, "and suggested that he * * * would be very glad to protect the interests of the plaintiffs and to have" Humphrey and Elkins "act as attorneys for all the heirs, including the plaintiffs, * * *; that said suggestion met with the approval of the plaintiffs and said approval was communicated by them to Dole * * *" (R. 21-22, par. XXIII). It thus appears that Dole told the plaintiffs two things: first, that there were certain matters in the estate that would require attention; and, second, that the services of an attorney would be necessary; and then he suggested two things, first, that "he (that is Dole) would be glad to

protect their interests''; and, second, that he would employ attorneys to represent them all. The plaintiffs agreed.

The complaint also shows that Dole, shortly after the death of Mrs. Dole in February of 1934, had full knowledge of the facts constituting the fraud which is the gravamen of the cause of action (R. 22-25, par. XXIV); but it alleges that Dole did not advise the plaintiffs ''specifically'' with regard such facts (R. 22, par. XXIII).

When the plaintiffs appointed Dole their agent to protect their interests in the estate, Dole had both the right and the duty to examine all matters relating to the estate bearing upon the rights of the plaintiffs and to report to them facts which they should know to safeguard their interests. Under elementary principles, his knowledge as the agent of the plaintiffs must be imputed to them.

Furthermore, the plaintiffs had readily available full knowledge of both the frauds. Although the complaint alleges that Dole did not specifically advise them with regard to the fraud which is the gravamen of the cause of action, still he was their agent and the slightest inquiry by them of him would have disclosed the facts. ''Means of knowledge are the same as knowledge.''

There can be no doubt that the fraud which is the gravamen of the cause of action is barred by limitations.

It will be recalled that the order authorizing the compromise was made on May 7, 1936, and the decree of final distribution and settlement of the account was made on November 30, 1936. As stated, the amended complaint, which for the first time named the Bank as a defendant was filed on February 20, 1939. It thus appears that the facts constituting the extrinsic fraud occurred within three years of the date on which the first amended complaint was filed.

But the fraud constituting the gravamen of the cause of action is the heart of the plaintiffs' case; if they cannot recover for this fraud, it would avail them nothing to set aside the probate orders; and as this fraud is barred by limitations, their entire case must fall.

IV. CONCLUSION.

The complaint shows that the Bank did not participate in the fraud which is the gravamen of the cause of action; and received no benefit from it; and so the complaint does not state any ground for relief against the Bank.

The facts constituting the so-called extrinsic fraud were material to the issues before the probate court and therefore the orders of that court were *res judicata* with respect to them.

These facts do not constitute an extrinsic fraud, because they were within the issue decided by the

probate court and did not operate to prevent the plaintiffs from presenting their case to that court.

Furthermore, the complaint shows that the fraud constituting the gravamen of the cause of action is barred by limitations and therefore plaintiffs' entire case is destroyed.

There can be no doubt that the order of the trial court dismissing the complaint should be affirmed.

Dated, San Francisco,
July 20, 1942.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

REVIEW OF CASES RELATING TO THE DOCTRINE OF RES JUDICATA.

Let us begin a review of these cases with the leading case in California on the subject.

In *Woolverton v. Baker*, 98 Cal. 628, 33 P. 731, the plaintiff in her first action alleged in her complaint that she had conveyed certain land to the defendant in trust for her to pay her the income during her life. In her second action, the plaintiff alleged in her complaint that she had conveyed the land to the defendant in consideration that he would apply sufficient of the rents to support her during her life. The plaintiff's first claim was a claim that the defendant held title in trust; her second claim was that he had agreed to apply the rents to her support. The court held that the plaintiff's second claim was relevant to the issue raised by her complaint in the first action; that it could have been litigated in the first action; and that therefore the judgment in that action was *res judicata* against her. The court said (98 Cal. 628, 631-632, 33 P. 731, 732-733):

“A party cannot litigate his cause of action by piecemeal, and, after a judgment against him seek in another action to obtain relief dependent upon the transaction therein adjudged, *by bringing forward claims and demands properly belonging to the first action. The judgment against him is conclusive, not only of what was in fact determined, but also of all matters which might have been presented in support of his cause of action and litigated therein.* The rule is stated by Vice-Chan-

cellor Wigram in *Henderson v. Henderson*, 3 Hare, 115: 'Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, *the court requires the parties to that litigation to bring forward their whole case*, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter *which might have been brought forward as a part of the subject in contest*, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, *but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*' "

We will not consider the intervening cases, but will next review the case of *Price v. Sixth District Agricultural Association*, 201 Cal. 502, 258 Pac. 387, which is a very recent case, but has been cited often since its decision and is an important decision on this subject in this state. The first action was a proceeding in mandamus instituted by the City and County of Los Angeles against the Chairman of the Board of Supervisors of the County and the Mayor of the City to compel them to execute an agreement, dated June 21, 1920, to which the City and County were parties, under which a stadium was to be erected. Judgment was entered in the mandamus proceeding that the agreement was valid and that the officials of the City

and County should execute it. Thereafter, another agreement was executed, dated November 15, 1921, making certain unimportant changes in the original agreement. The second action in this case was an action by the plaintiffs as citizens and taxpayers of Los Angeles to enjoin the erection of the stadium under the second agreement. The court held that the plaintiffs in the second action were represented by the officials of the City in the first action and were therefore in effect parties to the first action; that all of the contentions of the plaintiffs in the second action were relevant to the issues in the first action and could have been litigated in that action; and that therefore the judgment in the first action was *res judicata* against the plaintiffs. The court said (201 Cal. 502, 509-512, 258 P. 387, 390-391):

“This rule is similarly stated in 34 Corpus Juris, section 1162, page 750, where it is said: ‘A judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies, upon the same cause of action, in the same or another court, so long as it remains unreversed and not in any way vacated or annulled.’ * * *

“In sections 1908 and 1909 of the Code of Civil Procedure this rule has likewise been announced. * * * Appellants, admitting the general rule, however, seek to avoid the effect thereof by asserting that the causes of action are not the same; that the contract of June 21, 1920, made the subject of judgment by the district court of appeal on February 23, 1921, is not the basis of the cause of action here involved predicated upon the contract of November 15, 1921. But it is undisputed

that the latter contract is but a recast of the former and that the subject matter covered by the two contracts is the same. The issue tendered to both agreements is as to the power of the city or county to contract in the same way representing identical subject matter. In that sense the causes of action are identical. * * * We have no hesitancy, therefore, in concluding that the causes of action are substantially the same and that the rule of law above announced is applicable, provided always that the parties are identical.

“Moreover, it is immaterial under the peculiar facts of this case whether the causes of action be the same or not. Appellants in this connection cite Freeman on Judgments, fifth edition, pages 1416, 1417, as follows: ‘* * * a former adjudication may be used for two different purposes, namely, either as a complete bar to the relitigation of the same cause of action, or as conclusive evidence of some fact or issue common to different causes of action.’ (See, also, Horton v. Goodenough, 184 Cal. 451, 461 (194 Pac. 34).) But the fact is that the issue determined by the former suit is the only issue presented by the present suit. * * *

“Appellants, however, apparently have a misconception of this rule. They seem to contend that an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated. But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated all inquiry respecting the same

is foreclosed, *not only as to matters heard, but also as to matters that could have been heard in support of or in opposition thereto.* This rule has been aptly stated as follows: 'It is important to note in this connection, however, that even though the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, the estoppel so far as that right, title or issue is concerned must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made.' (Freeman on Judgments, 5th ed., sec. 677, p. 1432.) * * *

"This principle also operates to demand of a defendant that all his defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them. The rule has been stated as follows: 'The defendant in an action is ordinarily required to set up all his defenses which do not constitute separate causes of action, and if he neglects to do so is concluded by the judgment rendered in such action. The judgment operates as *res judicata*, not only in regard to the existence of the plaintiff's cause of action, *but as to the nonexistence of the defense which was not pleaded.* The reason for this rule lies in the principle that there must be an end to litigation, and, where a party has an opportunity to present his defense and neglects to do so, the demands of the law require that he should take the consequences.' (15 Ruling Case Law, sec. 446, pp. 969, 970.)"

In *Sutphin v. Speik*, 15 Cal. (2d) 195, 99 P. (2d) 652, the first action was an action by the plaintiff as

the assignee of an oil royalty to recover the royalties he claimed to be due him. In this action the trial court found that the plaintiff by virtue of his assignment was entitled to the royalty claimed by him on all the oil produced from wells on the real property which was the subject of the oil lease. The second action was an action by the plaintiff to recover royalties which had accrued after the judgment in the first action. In the second action defendant claimed for the first time that the wells on the property were not producing from any oil sand deposit beneath it, but that the wells were producing from a sand in state property under the ocean a considerable distance from the property subject to the lease, and that the defendant was actually paying a royalty to the state on the oil so produced. The court held that the defendant could have contended in the first action that the wells were producing from sands not under the property, and that therefore the judgment in the first action was *res judicata* against him. The court said (15 Cal. (2d) 195, 201-202, 101 P. (2d) 652, 655-656) :

“First, where the causes of action and the parties are the same, a prior judgment is a complete bar in the second action. This is fundamental and is everywhere conceded.

“Second, where the causes of action are different, but the parties are the same, the doctrine applies so as to render conclusive matters which were decided by the first judgment. As this court said in *Todhunter v. Smith*, 219 Cal. 690, 695 (28 Pac. (2d) 916): ‘A prior judgment operates as a bar against a second action upon the same cause, but in a later action upon a different claim or

cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' In the instant case, for example, *the severable installments of royalties due gave rise to separate causes of action*; but a determination of a particular issue in the prior action is *res judicata* in the second action. (See also, *Pratt v. Vaughn*, 2 Cal. App. (2d) 722 (38 Pac. (2d) 799).)

"Next is the question, under what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, *so that it could have been raised*, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. *Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable.* In *Price v. Sixth District*, 201 Cal. 502, 511 (258 Pac. 387), this court said: 'But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. * * *'"

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

GARAVENTA LAND AND LIVESTOCK CO., a
corporation, JOE GARAVENTA, LOUISE
GARAVENTA, his wife, FRANK GARA-
VENTA and WILLIAM GARAVENTA,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the
United States for the District of Nevada.

FILED

FEB 24 1941

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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WILLIAM M. KEARNEY, Esq.,
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Reno, Nevada,

DOUGLAS A. BUSEY, Esq.,
City Hall Bldg.,
Reno, Nevada,
For the Appellee. [1*]

In the District Court of the United States of
America, in and for the District of Nevada

No. 2741

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARAVENTA LAND & LIVESTOCK COM-
PANY, a corporation, JOE GARAVENTA,
LOUISE GARAVENTA, his wife, FRANK
GARAVENTA and WILLIAM GARAVENTA,
FIRST DOE, SECOND DOE, THIRD
DOE and FOURTH DOE,

Defendants.

COMPLAINT

United States of America,
District of Nevada—ss.

Comes now the United States of America, by and
through E. P. Carville, United States Attorney in
and for the District of Nevada, who prosecutes this
action on its behalf, and pursuant to instructions
of the Attorney General, complains of defendants
and for cause of action alleges:

I.

That the plaintiff at all times herein mentioned,
and ever since the year 1848, has been, and now is,
the legal owner, and is now entitled to the posses-
sion of the following described lands and premises,

situate, lying and being in the County of Washoe, State and District of Nevada, to-wit:

T. 20 N., R. 24 E., M.D.M., Nevada, Sec. 4, NE SW, NW SW, SW SW, SE SW, S/2 SW NW, S/2 SE NW: Sec. 9, Lot 17, containing 236.14 acres. [2]

II.

That on or about May 7, 1925, pursuant to that certain Act of Congress of June 7, 1924, entitled "An Act for the relief of settlers and town-site occupants of certain lands in the Pyramid Lake Indian Reservation, Nevada," being Chap. 311, Public Laws of the United States of America, passed by the Sixty-Eighth Congress, 1923-1925 (43 Stats. 596, Chap. 311), and the regulations promulgated thereunder by the Department of the Interior on March 3, 1925, as amended, the above named defendant, Garaventa Land and Livestock Company, made application to the Department of Interior to enter upon and to purchase the hereinbefore described lands; and pursuant to said Act, and Regulations, such application was allowed, and said defendant did enter upon said lands and was required to and did agree to pay plaintiff for said lands, as the purchase price thereof, the total sum of Four Thousand Five Dollars and Seventy cents (\$4,005.70), plus interest accruing after June, 1925, at the rate of four per centum (4%) per annum on all unpaid principal, such interest to be paid on or before April 10, 1936.

III.

That said defendant has failed, refused and neglected to pay said purchase price, or any part thereof, or interest, except the sum of One Thousand Eight Hundred and Fifty-three Dollars and Ninety-two cents (\$1,853.92), which sum was paid on or about June, 1925, and defendant has paid no further sum on said purchase price since said date.

IV.

That on or about May 13, 1936, the entry of said defendant upon said lands, and its right to purchase the same, was cancelled by the Department of the Interior, pursuant [3] to the terms of said Act of June 7, 1924, and said Regulations, for failure to pay the agreed purchase price thereof within the time allowed by law; and on March 10, 1936, said defendant was served by United States registered mail with written notice of such cancellation.

V.

That on or about June 2, 1936, written notice was served on said defendant by Alida C. Bowler, Superintendent of Carson Indian Agency, Bureau of Indian Affairs, Department of Interior, demanding that said defendant vacate and yield up to plaintiff said lands on or before September 30, 1936.

That notwithstanding said demand to vacate and said cancellation of entry, said defendant is still in possession and occupancy of said lands and wrongfully and unlawfully refuse to vacate said lands and yield the same to plaintiff.

VI.

That the defendant Garaventa Land and Live-stock Company was at all times herein mentioned and now is a corporation created and existing under and by virtue of the laws of the State of Nevada.

VII.

Plaintiff is informed and believes, and therefore alleges the fact to be that defendants First Doe, Second Doe, Third Doe and Fourth Doe, whose other or true names are to the plaintiff unknown, and the defendants Joe Garaventa, Louise Garaventa, his wife, Frank Garaventa and William Garaventa, claim title and right of possession to the hereinbefore described property, wrongfully, unlawfully and adversely to plaintiff; and plaintiff prays, upon learning the true names of said persons whose names are unknown, to insert the same herein and that they be made parties defendant herein. [4]

Wherefore, plaintiff prays judgment against the defendants for the recovery of the possession of said lands and premises, and for the issuance of all necessary writs to accomplish such object, together with costs of suit.

E. P. CARVILLE,
United States Attorney,
By THOMAS O. CRAVEN,
Assistant United States At-
torney. [5]

United States of America,
District of Nevada—ss.

I, Thomas O. Craven, upon oath do say:

That I am an Assistant United States Attorney for the District of Nevada; that I have read the foregoing complaint by me subscribed and that I know the contents thereof, and that the matters and things therein contained, as I am informed and believe, are true.

THOMAS O. CRAVEN

Subscribed and sworn to before me this 4th day of February, 1938.

O. E. BENHAM,

Clerk.

O. F. PRATT

Deputy.

(Seal)

[Endorsed]: Filed Feb. 4, 1938. [6]

[Title of District Court and Cause.]

NOTICE OF MOTION

To the plaintiff, United States of America, and to its attorney, E. P. Carville, United States Attorney, and his assistant, Thomas O. Craven, Reno, Nevada:

You and each of you will please take notice that the defendants, Garaventa Land & Livestock Company, a corporation, Joe Garaventa, Louise Gara-

venta, his wife, Frank Garaventa and William Garaventa, will move the court for an order to dismiss the bill of complaint herein upon the grounds stated in the motion to dismiss annexed hereto and made a part hereof.

That said motion will be made on Monday, May 9, 1938, at Carson City, Nevada, in the United States District Court for the District of Nevada, or as soon thereafter as the court will enter an order fixing a time for hearing said motion.

Dated: April 25, 1938.

(Signed) W. M. KEARNEY

Attorney for Defendants, Garaventa Land & Livestock Company, a corporation, Joe Garaventa, Louise Garaventa, his wife, Frank Garaventa and William Garaventa.

[Endorsed]: Filed April 28th, 1938. [7]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants, Garaventa Land & Livestock Company, a corporation, Joe Garaventa, Louise Garaventa, his wife, Frank Garaventa and William Garaventa, and on the records, pleadings and files in said cause, move the court to dismiss the bill of complaint filed herein upon the following grounds, to-wit:

I.

That it appears on the face of the bill of complaint that the plaintiff is not entitled to relief prayed for nor to any relief arising from the alleged facts as set forth in said bill.

II.

That it appears on the face of the bill of complaint that the same is wholly without equity.

III.

That it appears on the face of the bill of complaint that the court is without jurisdiction to grant the relief prayed [8] for in said bill nor any relief to the plaintiff upon the alleged facts.

IV.

That the purported cancellation of the entries referred to in paragraph IV. of the bill of complaint was and is null and void in this: That the Department of the Interior was and is without power to cancel the said entry and the purported cancellation was and is in excess of its jurisdiction so to do.

That upon the hearing of said motion, movents will use and rely upon all the papers, pleadings, files and records in the above-entitled case and the minutes of the court.

Dated: April 25, 1938.

(Signed) **W. M. KEARNEY**

Attorney for Movents.

It is stipulated that the foregoing Notice of Motion and Motion may be mailed for filing today so

as to be filed as of April 26, 1938, and Service of the foregoing Notice of Motion and Motion to Dismiss, by copy, is hereby admitted this 25th day of April, 1938.

E. P. CARVILLE

United States District Attorney

[Endorsed]: Filed April 26, 1938. [9]

In the District Court of the United States in and
for the District of Nevada

Minutes of Court

Wednesday, January 25, 1939

No. 2741

THE UNITED STATES,

vs.

GARAVENTA LAND & LIVESTOCK CO., a corporation, et al.

No. 2742

THE UNITED STATES,

vs.

J. A. CERASOLA, et al,

No. 2743

THE UNITED STATES,

vs.

W. J. CERASOLA, et al.

No. 2744

THE UNITED STATES,

vs.

M. P. DEPAOLI, et al.

No. 2745

THE UNITED STATES,

vs.

W. J. CERASOLA, et al.

Upon motion of Thomas O. Craven, Esq., Assistant U. S. Attorney, it is ordered that the motions to dismiss in the above-entitled cases be, and the same hereby are, overruled, and the defendants granted 10 days from and after this day within which to answer. [10]

[Title of District Court and Cause.]

MINUTES OF COURT

Thursday, January 26, 1939

Upon motion of Wm. S. Boyle, Esq., U. S. Attorney, it is ordered that the order made and entered on January 25, 1939, herein, overruling de-

defendants' motions to dismiss and giving said defendants 10 days within which to answer be, and the same hereby is, vacated and set aside. [11]

[Title of District Court and Cause.]

MINUTES OF COURT
of Wednesday, March 29, 1939

Defendant's motion to dismiss plaintiff's complaint having heretofore been submitted to and by the Court taken under advisement, It Is Ordered that defendants' motion to dismiss plaintiff's complaint be, and the same hereby is, denied. The defendants are granted an exception to the order upon the grounds stated in the motion. It Is Further Ordered that defendants be, and they hereby are, granted 20 days from and after this date within which to answer plaintiff's complaint. [12]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Garaventa Land & Livestock Company, a corporation, and for its answer to the complaint herein, admits, denies and alleges as follows, to-wit:

I.

That it appears on the face of the bill of complaint that the plaintiff is not entitled to relief prayed for nor to any relief arising from the alleged facts as set forth in said bill.

II.

That it appears on the face of the bill of complaint that the same is wholly without equity.

III.

That it appears on the face of the bill of complaint that the court is without jurisdiction to grant the relief prayed for in said bill nor any relief to the plaintiff upon the alleged facts. [13]

IV.

That the purported cancellation of the entries referred to in paragraph IV of the bill of complaint was and is null and void in this: That the Department of the Interior was and is without power to cancel the said entry and the purported cancellation was and is in excess of its jurisdiction so to do.

V.

For answer to paragraph I of the complaint, this defendant denies that the plaintiff at all the times mentioned in the complaint and/ or ever since the year 1848, or at any time subsequent to June, 1925, has been and/or now is entitled to the possession of the lands and/or premises described in paragraph I of the complaint, lying and being in the County of Washoe, State and District of Nevada, described as follows, to-wit:

T. 20 N., R. 24 E., M.D.M., Nevada, Sec. 4, NE SW, NW SW, SW SW, SE SW, S/2 SW NW, S/2 SE NW; Sec. 9, Lot 17, containing 236.14 acres.

This defendant admits, however, that the plaintiff is the holder of the legal title to said land, subject, however, to the contractual and other rights of the defendant hereinafter referred to.

VI.

For answer to paragraph II of said complaint, this defendant admits that on or about May 7, 1925, pursuant to that certain act of Congress of June 7, 1924, entitled:

“An Act for the Relief of Settlers and Townsite occupants of certain lands in the Pyramid Lake Indian Reservation,”

being Chapter 311, Public Laws of the United States of America, passed by the 68th Congress, 1922-1925, 596, and the regulations promulgated thereunder by the department of the Interior on [14] March 3, 1925, as amended, this defendant made application to the Department of the Interior to enter upon and purchase the hereinbefore described lands; and it admits that pursuant to said act and regulations, such application was allowed and said defendant did enter upon said lands and was required to pay plaintiff for said lands as the purchase price thereof, the total sum of Four Thousand and Five Dollars and Seventy Cents (\$4,005.70), plus interest accruing after June, 1925, at the rate of four per cent (4%) per annum on all unpaid principal. The defendant, Garaventa Land & Livestock Company, a corporation, denies each,

every and all the remaining allegations of said paragraph.

VII.

For answer to paragraph III of said complaint, this defendant admits that he has failed to pay said purchase price, or any part thereof, or the interest thereon, except the sum of One Thousand Eight Hundred Fifty-three Dollars and Ninety-two Cents (\$1,853.92), which said sum was paid on or about June, 1925. It denies, however, that it refused and neglected or refused or neglected to pay said purchase price or the interest thereon, or any part thereof, or the interest thereon, except said sum of One Thousand Eight Hundred Fifty-three Dollars and Ninety-two cents (\$1,853.92), and in this connection refers to the affirmative defense herein with reference to its offer to pay the said purchase price and the interest thereon.

VIII.

For answer to paragraph IV of said complaint, defendant, Garaventa Land & Livestock Company, a corporation, denies according to information and belief, each, every and all of the allegations contained in paragraph IV of said complaint, except that this defendant admits that during the month of March, 1926, it received [15] a letter by United States registered mail, containing a written notice purporting to cancel a contract of purchase entered into between defendant, Garaventa Land & Livestock Company, a corporation, and plaintiff.

IX.

For answer to paragraph V of the complaint, defendant denies each, every and all of the allegations contained in said paragraph, except the defendant admits that it is still in possession and occupancy of the lands described in paragraph I of the complaint, and has refused to vacate said lands and/or yield the same to plaintiff.

X.

For answer to paragraph VI of the complaint, this defendant admits each, every and all of the allegations therein contained.

XI.

For answer to paragraph VII of said complaint, the defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained.

Further answering said complaint and by way of further defense, the defendant, Garaventa Land & Livestock Company, a corporation, alleges:

I.

That ever since about the year 1865, the defendant, by itself, and through its predecessors and grantors in interest, has been in the possession of and actually occupied the lands described in the complaint as follows:

T. 20 N., R. 24 E., M.D.M., Nevada, Sec. 4,
NE SW, NW SW, SW SW, SE SW, S/2 SW

NW, S/2 SE NW; Sec. 9, Lot 17, containing 236.14 acres. [16]

That said defendant and its predecessors and grantors in interest have improved the said land and broken it from its raw desert condition and have constructed dams in the Truckee River and ditches leading therefrom to conduct water to the said lands for irrigation purposes; that they have constructed improvements on the said lands consisting of the following:

Houses for themselves and their families; barns, stables and corrals for their livestock; cellars for the storage of farm products; chicken houses for the care of fowl; that they have fenced the said lands to protect the same against trespass by livestock; that they have paid all taxes levied and assessed against the said premises, both as possessory claims and on the adjacent patented land as well as personal property taxes for the livestock kept thereon.

That at the time of the entry of said land by the grantors and predecessors of this defendant, the boundaries of said Pyramid Lake Indian Reservation had never been surveyed and were undetermined and that the said reservation had never been set apart as a reservation by presidential proclamation or otherwise and that said reservation boundaries were not surveyed or marked until the year 1874; that within the area fenced by the defendant and its predecessors in interest and bordering upon the said lands, there are lands to which

patent has been issued by the United States of America which forms a part of the ranch premises of the defendant and which patented areas are irrigated by means of the same ditches and dams as the lands referred to in the complaint, all as a single farm unit; that the said lands have been so occupied and improved by the defendant and its grantors and predecessors in interest for more than seventy years with the full knowledge, acquiescence and consent of the plaintiff. That at the time said lands were entered, the grantors of [17] defendant entered and located the same under the then existing land laws of the United States of America, which entitled settlers to enter surveyed and unsurveyed lands and to improve and cultivate the same as a condition precedent to obtaining a patent therefor. That all of the requirements and conditions of the land laws of the United States of America as to cultivation and improvement and other particulars have been fully met and complied with by the defendant; that to permit the said defendant to be ejected from the said premises at this time would be unjust and unconscionable; and that the plaintiff is guilty of laches.

Further answering said complaint and by way of further defense, the defendant, Garaventa Land & Livestock Company, alleges and shows to the court:

I.

That under and pursuant to the provisions of a certain act of the Congress of the United States of America of June, 1924, entitled:

“An Act for the Relief of Settlers and Town-site Occupants of Certain Lands in the Pyramid Lake Indian Reservation, Nevada”,

being Chapter 311, Public Laws of the United States of America, passed by the 68th Congress, 1923-1925, (43 Stats. 596, Chapter 311), the defendant, Garaventa Land & Livestock Company, a corporation, duly, regularly and timely entered into a contract to purchase the lands described in paragraph I of the complaint, to-wit:

T. 20 N., R. 24 E., M.D.M., Nevada, Sec. 4, NE SW, NW SW, SW SW, SE SW, S/2 SW NW, S/2 SE NW; Sec. 9, Lot 17, containing 236.14 acres,

for the total purchase price of Four Thousand and Five Dollars and Seventy Cents (\$4,005.70), plus interest at the rate of four per cent (4%) per annum after June, 1925. That after the making of [18] said contract of purchase, this defendant was granted an extension of time within which to complete the payment of the purchase price and interest on said contract; that during the financial depression commencing about the year 1930, this defendant found itself heavily in debt with all of its assets consisting of land and livestock heavily mortgaged, and with depreciated livestock values and farm products which existed at that time, it was impossible to obtain funds with which to pay the balance of said purchase price; that on representations to the plaintiff and a showing of the im-

possibility of obtaining funds while the livestock and farm products were depreciated in value and the defendant's property and assets were under heavy mortgage, further extensions of time were obtained to raise the money to complete said purchase price; that the defendant carried on negotiations to raise said purchase price and to refinance its said mortgages on the basis of said extensions of time and made sacrifices of its property to refinance and did so refinance and when the defendant obtained said funds and made an offer to pay the same, said funds were refused on the basis that the said contract had been canceled while negotiations to raise said money were pending:

II.

That this defendant has offered to pay to the plaintiff the said amount of purchase money, together with interest at the rate of four per cent (4%) per annum from June, 1925, but that the plaintiff has refused and still refuses to accept said payment; that the said payment has been tendered to the plaintiff through its duly constituted agents, to-wit: The Register and Receiver of the United States Land Office at Carson City, Nevada, but that the said officers refused to accept said payment and still and now refuse to accept the same; that the defendant has at all times [19] kept the said tender and payment good and still and now offers to pay the said purchase money, together with interest, in full.

III.

That under and by virtue of the terms of the Act of June 7, 1924, aforesaid, the said lands referred to in paragraph I of said complaint were set apart from the said Pyramid Lake Indian Reservation and do not now constitute a part thereof and that under the terms of the said act of June 7, 1924, the Secretary of the Interior was and is without authority to cancel the said contracts in the manner and form as alleged in the complaint or at all; and that the said contracts of purchase are still in full force and effect and that by virtue thereof, this defendant is entitled to the continued occupancy of said land.

Wherefore, this defendant prays that the said plaintiff take nothing by its said complaint; that the defendant be awarded judgment requiring the plaintiff to accept the said purchase moneys heretofore and now tendered in payment of and pursuant to the Act of June 7, 1924, 43 Stats. 596, Chapter 311, and that the plaintiff be ordered and directed to issue a patent to the defendant to said lands and for such other and further relief as to the court seems just and equitable.

W. M. KEARNEY

Attorney for Defendant, Garaventa Land
& Livestock Company, a Corporation.

[20]

State of Nevada,
County of Washoe—ss.

Joe A. Garaventa, being first duly sworn, deposes and says: That he is the President of Garaventa Land & Livestock Company, a corporation, one of the defendants above named; that he makes this verification for and on behalf of said defendant corporation; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JOE A. GARAVENTA

Subscribed and sworn to before me this 25th day of April, 1939.

(Notarial Seal) GEORGIA NEWMAN

Notary Public in and for the County of Washoe,
State of Nevada.

My Commission expires May 22, 1940.

Service of the foregoing Answer, by copy, is hereby admitted this 28th day of April, 1939, and it is hereby stipulated that the same may be mailed to-day for filing.

WILLIAM S. BOYLE

United States Attorney

[Endorsed]: Filed April 29th, 1939. [21]

[Title of District Court and Cause.]

MINUTES OF COURT

of Wednesday, May 10, 1939

Upon the filing herein this day, by the U. S. Attorney, of request for default, it is ordered that the default of each of the defendants herein, save and except the defendant Garaventa Land & Livestock Company, be entered for their failure to answer plaintiff's bill of complaint. [22]

[Title of District Court and Cause.]

MINUTES OF COURT

January 6, 1940

At this time appears Miles N. Pike, Esq., U. S. Attorney, and John S. Halley, Esq., Assistant U. S. Attorney, attorneys for the plaintiff; and Messrs. Wm. M. Kearney and D. A. Busey, attorneys for the defendants herein. The Court suggests to counsel that the submission of these cases be vacated and that counsel consider the submission of further evidence applicable to these cases and to advise the Court in respect thereto within 30 days. Counsel for the respective parties agreeing thereto, it is so ordered. [23]

[Title of District Court and Cause.]

MINUTES OF COURT

Monday, July 1, 1940

This being the time heretofore fixed for the further trial of these cases to permit plaintiff to introduce additional evidence and the same coming on regularly this day, Thomas O. Craven, Esq., Assistant U. S. Attorney, appearing for and on behalf of the plaintiff; and no appearance by or on behalf of the defendants. Mr. Craven files "List of Additional Exhibits and Evidence" and offers in evidence the following exhibits, which are admitted subject to counsel for the defendants being allowed 30 days from and after this date to object to the same and offer additional testimony, to-wit: "AA" photostatic reproduction of decision in the case of Central Pacific Railway Company reported in the 45th Volume, Land Decisions pages 502, 503, 504, 505. "BB" Letters of May 13, May 18, 1865 and August 19, 1865, from the Commissioner of the General Land Office to the Surveyor General of California, in which the Commissioner advises the Surveyor General that "none of the lands hitherto known as the Truckee Reservation shall be open to sale and settlement, or interfered by the whites, except so far as the line of the Pacific Railway is concerned. "CC" Report No. 175, dated January 4, 1859, by [24] F. Dodge, Indian Agent. Report No. 31, dated October 22, 1866, by D. N. Cooley, Indian Agent, beginning on page 28 at "Nevada" and ending at "Utah", page 30. Report No. 32, dated September

1, 1870, by J. M. Lee, First Lieutenant, U. S. Army (Special Indian Agent for Nevada). Report of Joseph M. McMaster, Indian Agent, dated August 15, 1884, beginning at the bottom of page 126 and ending at top of page 128. Report of W. D. C. Gibson, U. S. Indian Agent, dated August 20, 1885, page 147. Report of Superintendent John B. Scott, dated August 29, 1889, page 249. Report of Superintendent S. S. Sears, dated August 27, 1890, beginning at the bottom of page 147 and continuing on page 148. Report of Superintendent C. C. Warner, dated August 17, 1891, pages 299 and 300. "DD" Plat approved Sept. 25, 1865, T. 20 N., R. 24 E. Survey executed before the Reservation was created. "EE" Plat approved Feb. 8, 1879. Closings on the Reservation boundary. "FF" Plat approved Jan. 19, 1888. Closings on the Reservation boundary. "GG" Plat approved Feb. 6, 1912. Resurvey, the lands within the Reservation. "HH" Plat-B approved Dec. 31, 1913. Shows culture and topography. "II" Plat-A approved Dec. 31, 1913. Areas and resurvey data. "JJ" Plat approved Nov. 1, 1935. Supplemental plat of Sec. 9, showing lottings. "KK" Plat approved Feb. 19, 1907, T. 21 N., R. 24 E. Survey of Portion of Area within the Reservation. "LL" Plat approved Feb. 25, 1908. Shows the lottings along the Reservation Boundary. "MM" Plat approved Feb. 6, 1912. Survey of portion of area within the Reservation. "NN" Plat-B approved May 15, 1913. Shows culture and topography. "OO" Plat-A approved May 15, 1913.

Area and resurvey data. "PP" Plat approved Oct. 20, 1937. Supplemental plat of Secs. 9 and 15, showing lottings. "QQ" Photographic copy of Map of Pyramid Lake Indian Reservation, Nev., surveyed in Jan. 1865 by Eugene B. Monroe. "RR" [25] 36th Congress, 1st Sess. 1859-60, Senate Executive Documents, Vol. 1, No. 2, title page and pages 730 to 750 inclusive, of the report of the Secretary of the Interior. "SS" 36th Congress, 2nd Sess. 1860-61, Senate Executive Documents, Vol. 2, No. 1, Title page and pages 68 to 106 inclusive, of the report of the Secretary of the War. "TT" 37th Congress, 2nd Sess. 1861-62, Senate Executive Documents, Vol. 1, No. 1, Pt. 1, title page and pages 616, 617, 618, 619 and 716 to 727 inclusive, of the report of the Secretary of the Interior. "UU" Report of the Commissioner of Indian Affairs for the year 1862, title page and pages 215 to 229 inclusive. "VV" Report of the Commissioner of Indian Affairs for the year 1863, Title page and pages 390, 391, 392, 393, 416, 417, 418 and 419. "WW" Report of the Commissioner of Indian Affairs for the year 1864, title page and pages 138 to 151 inclusive. "XX" Report of the Commissioner of Indian Affairs for the year 1865, title page and pages 14 to 17 inclusive. "YY" Report of the Commissioner of Indian Affairs for the year 1866, title page and pages 112 to 122 inclusive. "ZZ" Report on Indian Affairs by the Acting Commissioner for the year 1867, title page and pages 168 to 173 inclusive.

“A1” Annual report of the Commissioner of Indian Affairs for the year 1868, title page and pages 142 to 149 inclusive. “A2” (No. 1963) Letter of September 16, 1862, from James W. Nye to Commissioner of Indian Affairs; letter of June 27, 1864, from Jacob F. Lockhart to Commissioner of Indian Affairs; report of Governor James W. Nye, June 17, 1862, including a report of Warren Wasson, April 20, 1862; letter of June 25, 1863, from Jacob F. Lockhart to Commissioner of Indian Affairs with endorsement thereon of Orion Clemens, dated June 25, 1863; letter of March 17, 1863, from Jacob F. Lockhart to Commissioner of Indian Affairs. “A3” (No. 1964) Letter of July 8, 1860, from [26] F. Dodge to Commissioner of Indian Affairs including newspaper clippings; letter of March 15, 1864, from Jacob F. Lockhart to Commissioner of Indian Affairs, with endorsement broadside. “A4” (No. 1965) Letter of June 7, 1860, from F. Dodge to Commissioner of Indian Affairs, with enclosures dated June 25, 1860 and June 9, 1860; letter of August 9, 1860, from F. Dodge to Commissioner of Indian Affairs with enclosed broadside. “A4” No. 1965) Letter of June 7, 1860, from F. Dodge to Commissioner of Indian Affairs, with enclosure; letter of November 22, 1864, from Jacob F. Lockhart to James W. Nye; letter of November 25, 1859, from F. Dodge to Commissioner of Indian Affairs; letter of August 29, 1864, from Jacob F. Lockhart to James W. Nye; copy of letter of July 15, 1861, from Warren Wasson to James

W. Nye; letter of January 5, 1864, from Jacob F. Lockhart to James W. Nye; letter of June 23, 1860, from F. Dodge to Commissioner of Indian Affairs. "A5" (No. 1966) Copy of letter of November 29, 1859, from A. B. Greenwood, Commissioner, to F. Dodge; copy of a letter of November 29, 1859, from A. B. Greenwood, Commissioner, to Samuel A. Smith; copy of a letter of November 26, 1859, from A. B. Greenwood, Commissioner, to Secretary of the Interior. "A6" (No. 1986) Copy of Letter of July 7, 1891, from Geo. H. Shields to The Acting Secretary; letter of February 5, 1866, from J. W. Edmund to Commissioner of Indian Affairs with enclosure dated December 8, 1865; letter of June 27, 1865, from Jacob F. Lockhart; letter of September 12, 1860, from J. Thompson to Chs. E. Mix, with enclosure dated September 11, 1860; letter of May 14, 1866, from Jas. Harlan to Commissioner of Indian Affairs. "A7" (No. 1987) Letter of March 12, 1866, from J. W. Edmund to Commissioner of Indian Affairs; letter of October 23, 1865, from H. G. Parker to Commissioner of Indian Affairs; letter of June 7, 1865, from Jacob F. Lockhart to Commissioner [27] of Indian Affairs; letter of October 12, 1865, from Jacob F. Lockhart to Commissioner of Indian Affairs. "A8" (No. 1989) Copy of a letter of August 30, 1860, from Charles E. Mix to F. Dodge; copy of a letter of May 12, 1866, from D. N. Cooley to Secretary of the Interior; copy of a letter of May 26, 1866, from D. N. Cooley to H. G. Parker, copy of letter of August 29, 1860, from J.

Thompson to Secretary of War. "A9" (No. 1990) Letter of March 28, 1866, from H. G. Parker to Commissioner of Indian Affairs; letter of May 10, 1866, from H. G. Parker to Commissioner of Indian Affairs. "A 10" (No. 1993) Map No. 944, Tube 926, part of Pyramid Lake Reservation, Nevada. "A11" (No. 1994) Map No. 915, Tube 45, covering area between Lake Tahoe and Pyramid Lake. "A12" (No. 1995) Map No. 6788, Tube 780, covering Sections 5, 8, 9, 15, 16, 21, 22, 23, 27, 28, 32, 34 and 38 of Township 21 North, Range 24 East and Sections 3, 4, 5, 8, 9 and 10, Township 20 North, Range 24 East. "A13" (No. 1996) Map No. 8528, Tube 1229, Pyramid Lake Indian Reservation, Nevada. "A14" (No. 1997) Map No. 776, (No. 2) Tube 275, covering area in townships 20 to 29 North, inclusive, Mount Diablo Baseline, Ranges 20 to 25 East, Mount Diablo Meridian. "A15" Sam Davis' History of Nevada. "A16" Laws of Nevada Territory, 1862-1864, p. 196. Memorial to Congress of December 19, 1862, relative to the expenses incurred by the territory of Nevada on account of Indian depredations and in protecting the white settlements. "A17" Statutes of Nevada for 1867, pages 183 & 184. Resolution of March 29, 1867, which authorizes the Governor to make up and forward to the United States Senators and Congressman from Nevada a true and correct statement of the amount of expenditures incurred by the State of Nevada in paying soldiers in the service of the National Government and in suppressing Indian

disturbances. "A18" Act of March 4, 1929 (45 Stat. pt. 2, [28] ch. 723, p. 2378) Secretary of Treasury authorized and directed to pay to the State of Nevada \$595,076.53 in full settlement of all advances and expenses, and interest thereon, made by the State. "A19" Senate Document No. 210, p. 2278, Vol. 70, Pt. 2, Congressional Record, 70th Congress, Second Session."

Mr. Craven requests and is granted the right to later file a photo-stat copy of opinion by Assistant Attorney General Shield of date of July 7, 1891.

[29]

[Title of District Court and Cause.]

ORDER

Upon motion of Thomas O. Craven, Assistant United States Attorney, and good cause appearing therefor,

It is hereby ordered that a certified photostatic copy of the original "Map of Utah Territory Showing the Routes Connecting it with California and the East, Compiled in the Bureau of Topographical Engineers of the War Department from the Latest and Most Reliable Data, 1858", and a certified photostatic copy of a letter dated November 25, 1859 addressed to Honorable A. B. Greenwood, Commissioner of Indian Affairs from F. Dodge, Indian Agent of Nevada, be and the same hereby are ordered admitted into evidence in the above entitled

matters, subject, however, to the right of the defendants, upon good cause shown within thirty (30) days to move that the same be stricken from evidence.

Dated August 31st, 1940.

FRANK H. NORCROSS

U. S. District Judge

[Endorsed]: Filed Aug. 31st, 1940. [30]

[Title of District Court and Cause.]

OBJECTIONS BY DEFENDANTS' TO OFFERS IN EVIDENCE BY PLAINTIFF'S OF ADDITIONAL EXHIBITS AND EVIDENCE

Defendants' object to the introduction in evidence of each of plaintiff's exhibits from AA to ZZ inclusive and to each of plaintiff's exhibits from A-1 to A-21 inclusive upon the following grounds:

That each of said exhibits is argumentative, self serving, incompetent, irrelevant and immaterial and no proper foundation has been laid for introduction into evidence of any said exhibits.

Defendants' also object to exhibits AA, BB, CC, RR, SS, TT, UU, VV, WW, XX, YY, ZZ and exhibits A-1 to A-9 inclusive, A-15, A-19 and A-20 upon the following grounds:

That each of such exhibits are conclusions of fact conclusions of law and opinion evidence.

Defendants' also move to strike each and all such exhibits from evidence upon the same grounds as above stated for the objections to the offer of each said exhibits in evidence.

Dated: September 30, 1940.

W. M. KEARNEY

Attorney for Defendants in
Cases #2741 and 2744

DOUGLAS A. BUSEY

Attorney for Defendants in
Cases #2742, 2743 and 2745

[Endorsed]: Filed Sept. 30, 1940. [32]

Douglas A. Busey
Attorney and Counselor at Law
16 17 City Hall Building
Reno, Nevada.

October 2, 1940

Otto E. Benham, Clerk
United States District Court,
Carson City, Nevada

Dear Mr. Benham:

On Monday I filed in your office a document entitled "Objections by Defendants' To Offers in Evidence of Plaintiff's Additional Exhibits for Evidence." The title of this document should read: "Objections by Defendants' to Offers in Evidence by Plaintiff's of Additional Exhibits and Evidence."

In line 20 the word "open" should read "opinion".

Will you please call this letter to the attention of the Court.

Very truly yours,

/s/ DOUGLAS A. BUSEY

DAB:la

Received Oct 4 1940 Clerk's Office [33]

[Title of District Court and Cause.]

OFFERS OF ADDITIONAL EXHIBITS
AND EVIDENCE

Exhibit 7.

Memorial to Congress. "Relative to the Depredations committed by Indians in the Territory of Nevada, and the expenses incurred in the protection of the settlements." Statutes of Nevada 1862, page 196.

Exhibit 8.

Joint Resolution No. XV passed March 7, 1865. Statutes of Nevada 1864-5, page 462.

Exhibit 9.

Senate Memorial and Joint Resolution relating to Indian Depredations No. III passed January 23, 1866. Statutes of Nevada 1866, page 267.

Exhibit 10.

Memorial No. XXIV passed March 1, 1873, Statutes of Nevada, 1873, page 237.

Exhibit 11.

Joint Memorial and Resolution relating to Pyramid Lake Reservation in the State of Nevada No. IX passed January 29, 1877, Statutes of Nevada, 1877, page 215.

Exhibit 12.

Senate Joint Memorial and Resolution relating to Pyramid Lake Reservation No. VIII passed February 6, 1885. Statutes of Nevada 1885, page 143.

Exhibit 13.

“An Act Relating to the Proving of Indian War Claims”. Approved February 27, 1885. Chapter XLVI Statutes of Nevada 1885, page 47.

Exhibit 14.

“An Act Relating to the Proving of Indian War Claims”. Chapter XXXV. Approved February 8, 1887. Statutes of Nevada 1887, page 40.

Exhibit 15.

“An Act Relating to the Proving of Indian War Claims”. Chapter XXIX. Approved February 13, 1889. Statutes of Nevada 1889, page 32. [35]

Exhibit 16.

“An Act Relating to the Proving Up of Indian War and Indian Depredation Claims”. Chapter CX. Approved March 17, 1903. Statutes of Nevada 1903, page 205.

Exhibit 17.

Memorial and Joint Resolution relating to Pyramid Lake Reservation No. VIII, passed March 6, 1903, Statutes of 1903, page 228.

Exhibit 18.

Senate Joint Resolution No. 4 approved February 14, 1929. Statutes of 1929, page 429.

Exhibit 19.

Senate Joint Resolution No. 31 Statutes of Nevada 1937, page 571.

W. M. KEARNEY

Attorney for Defendants in
Cases #2741 and #2744

DOUGLAS A. BUSEY

Attorney for Defendants in
Cases #2742, 2743, and 2745

It is hereby stipulated by and between Plaintiff's attorney and the attorneys for the respective Defendants that the Resolutions, Memorials and Statutes above offered in evidence may be offered by reference only to the Statute book and page number thereof where such Statute, Resolution or Memorial may be found.

Dated: October 18, 1940.

THOMAS O. CRAVEN

Attorney for Plaintiff.

W. M. KEARNEY

DOUGLAS A. BUSEY

Attorneys for Defendant.

[Endorsed]: Filed Oct. 19th, 1940. [36]

[Title of District Court and Cause.]

MINUTES OF COURT

of Monday, January 6, 1941

Upon motion of Thomas O. Craven, Esq., Assistant United States Attorney, and opposing counsel stipulating and agreeing thereto, it is ordered, subject to the further order of the Court, that these cases will stand submitted, with the understanding that the objections made by both sides as to the admissibility of the evidence can be ruled upon at the time such matters are decided on the merits.

[37]

[Title of District Court and Cause.]

MINUTES OF COURT

of Saturday March 8, 1941

This case having heretofore been tried, submitted to and by the Court taken under advisement, it is ordered that judgment enter for the defendants. The Court now files written opinion. At the request of Miles N. Pike, Esq., United States Attorney, an exception to this ruling is noted for counsel for the plaintiff. [38]

Filed March 8th, 1941.

O. E. BENHAM,
Clerk.

By _____,
Deputy.

In the District Court of the United States of
America, in and for the District of Nevada

No. 2741.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARAVENTA LAND & LIVESTOCK COM-
PANY, a corporation, et al.,

Defendants.

OPINION AND DECISION

Norcross, District Judge.

This is an action to recover possession of certain lands, containing 236.14 acres, within the exterior boundaries of the Pyramid Lake Indian Reservation. Basis of recovery is alleged failure to comply with the provisions of the Act of Congress of June 7, 1924, entitled "An act for the relief of settlers and town-site occupants of certain lands in the Pyramid Lake Indian Reservation, Nevada," 43 U. S. Stats. 596, Title 25, U. S. C. A., p. 344, and regulations promulgated thereunder. Section 1 of said Act provides:

"That the Secretary of the Interior is hereby authorized to sell to settlers or their transferees, under such terms, conditions, and price per

acre as the said Secretary may prescribe, any lands * * * that have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act: * * * Provided further, That said sales shall be by private cash entry after it has been shown * * * that the lands applied for have been settled upon, occupied, and improved as required by this Act. * * * The proceeds of said sales shall be * * * for the Piute Indians of the said Pyramid Lake Indian Reservation.” [39]

Section 2 of said Act deals with sales of lands in the town of Wadsworth within said Reservation.

Section 3 provides:

“That titles to lands * * * acquired by patents heretofore issued by the United States to any railroad company, individual, or the State of Nevada, or by certification of the State of Nevada, are hereby confirmed.”

Section 4 provides:

“All sales in accordance with section 1 of this Act shall be made through the local land office within ninety days after the price of the land shall have been fixed by the Secretary of the Interior: Provided, That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the

Piute Indians of the Pyramid Lake Indian Reservation."

The complaint alleges that on or about May 7, 1925, pursuant to said Act and the Regulations promulgated thereunder, the Defendant, Garaventa Land and Livestock Company, made application to the Department of Interior to enter upon and to purchase the lands in question, and, pursuant to said Act and Regulations, such application was allowed, and said defendant did enter upon said lands and was required to and did agree to pay plaintiff therefor, as purchase price thereof, the total sum of \$4,005.70, plus interest at 4% per annum on all unpaid principal, such interest to be paid on or before April 10, 1936. That said defendant has failed, refused and neglected to pay said purchase price or interest, except the sum of \$1,853.92, which sum was paid on or about June, 1925, and defendant has paid no further sum on said purchase price since said date. That on or about May 13, 1936, the entry of said defendant upon said lands, and its right to purchase the same, was cancelled by the Department of the Interior, pursuant to the terms of said Act and said Regulations, and on March 10, 1936, said defendant was served with written notice of such cancellation. [40]

The answer filed by defendant corporation denies refusal and/or neglect to pay said purchase price or the interest thereon, except said sum of \$1,853.92, and alleges that ever since the year 1865, the de-

fendant, by itself, and through its predecessors and grantors in interest has been in possession and actual occupation of the lands described, improved the same and diverted water from the Truckee River by means of dams and ditches for irrigation purposes and constructed improvements thereon consisting of houses, barns, stables, corrals and enclosed the same with fence. That at the time of original entry upon said land by the grantors and predecessors of defendant, the boundaries of said Reservation had never been surveyed and were not so surveyed or marked until the year 1874. That after making said contract of purchase, pursuant to said Act of 1924, defendant was granted an extension of time within which to complete the payment of the purchase price and interest. That during the financial depression, commencing about the year 1930, defendant found itself heavily in debt and impossible to obtain funds with which to pay the balance of said purchase price. That further extensions of time were obtained to raise the money to complete said purchase price. That defendant carried on negotiations to raise said purchase price and when defendant obtained said funds and made an offer to pay the same, said funds were refused on the basis that the said contract had been cancelled. That defendant has offered to pay to plaintiff the said amount of purchase money together with interest and has tendered the same to the Register and Receiver of the United States Land Office at Carson City, Nevada, but said officers refused to accept said

payment and still and now refuse to accept the same; that the defendant has at all times kept the said tender and payment good and still and now offers to pay the said purchase money, with interest, in full. [41] Defendant prays judgment that plaintiff take nothing by its complaint; that defendant be awarded judgment requiring plaintiff to accept the said purchase moneys heretofore and now tendered and that patent be directed to be issued to defendant for said lands and for such other and further relief as to the Court seems just and equitable.

This and other similar actions, consolidated for hearing, presents the question of the legal rights of the respective parties to certain lands within the exterior boundaries of the Pyramid Lake Indian Reservation.

The lands in question, in the main, have been continuously occupied and improved by defendants and their grantors and predecessors in interest for the past seventy or more years, the earliest occupation of settlers thereon being about the year 1863, and a number were made in 1865 and 1866. Water rights on lands involved in two of the cases are of dates 1880 and 1890. The Reservation was officially established by proclamation of President Grant, March 23, 1874. In 1859, the Indian Superintendent located at Salt Lake City, Utah, recommended to the Superintendent of Indian Affairs at Washington, D. C. that Pyramid Lake and Walker Lake, with adjacent lands surrounding, in then Western

Utah Territory, be set apart and reserved as and for Reservations for Indians residing in the vicinity thereof. This recommendation was approved and the Secretary of the Interior and the Commissioner of the General Land Office advised accordingly. No further official action appears to have been taken respecting said Reservations until the President's Proclamation in 1874. In the case of *United States v. Walker River Irrigation District*, 104 F. 2d. 334, 338, the Circuit Court of Appeals of this Circuit held that the executive order of President Grant of 1874, related back to 1859, and is controlling in this case. See also decision of this Court in the same case to the same effect, 11 F. Supp. 158, 162. [42]

It is a matter of well known history that following the settlement of white colonists on the American continent prior to the Revolution and subsequent thereto for more than a century, differences arose between the Indian inhabitants and the white settlers respecting their claimed respective rights to the occupied domain. Instances where actual warfare followed are numerous. The section of the Nation acquired by the Treaty of Guadalupe Hidalgo, concluding the Mexican War, was subject to the same conditions. The discovery of gold in California in 1848, attracted emigrants in large numbers to that section. From the Indian's point of view, the white emigration interfered with their prior rights of possession, particularly, rights to maintain a

livelihood from hunting, fishing and other natural products.

President Grant, who issued the Executive Orders of May 24, 1874, affirming the establishment of the Pyramid Lake and Walker Lake Indian Reservations, had served as commanding officer at a fort established at Humboldt Bay, California, in the early 50's, to deal with the Indian situation in that section and, hence, was familiar with the situation in the far West generally including that of the then Territory of Utah. In his message to Congress of December 7, 1874, he said,

“The policy adopted for the management of Indian affairs, known as the peace policy, has been adhered to with most beneficial results. It is confidently hoped that a few years more will relieve our frontiers from the danger of Indian depredations.”

The Indian situation in the Territory of Utah in 1859, and thereafter in the Territory and State of Nevada, is quite fully covered in the opinion of Judge St. Sure, 11 F. Supp. 162, cited *supra*. Reference here will be made only to the fact that by reason of occurrences in 1859, two engagements occurred in 1860, within what later was determined to be within the confines of the Reservation known respectively as the [43] First and Second Battle of Pyramid Lake. In the First the Indians were victorious and in the Second they were defeated. In 1863, three several calls were made on the Governor

of the Territory of Nevada to raise troops to aid in keeping open the overland stage and emigrant route to California, threatened with closure by warring Indians.

By Acts of Congress of 1862 and 1864, provision was made for the extension of a railroad system to the Pacific Coast, in aid of which, land grants were made for a two hundred feet right of way and odd numbered sections of the public domain for a width of twenty miles on each side of the right of way. The Central Pacific Railroad was completed in 1869, and crossed the southern portion of the Pyramid Lake Indian Reservation. A railroad division point was established at Wadsworth within the exterior boundaries of said Reservation. The State of Nevada was admitted in 1864 and its enabling act provided a grant of the 16th and 36th sections of each township. Lands within the Reservation so granted to the State and Central Pacific Railroad have been recognized as not affected by any prior withdrawal in respect to the said Reservation.

At the time of the Admission of the State of Nevada into the Union of States, October 31, 1864, there had been no surveys of public lands within its confines. Such surveys were not begun until about the year 1866. The discovery of the Comstock Lode in 1859 was the occasion of a rapid increase of population in the adjacent territory. This occasioned a demand for agricultural products which the region was able to produce. The State being within the arid region, irrigation was necessary for substantial de-

velopment of lands available for such reclamation. White settlers entered upon such lands in Western Nevada and diverted waters from the Truckee, Carson and Walker Rivers for the irrigation thereof. The Federal land laws then recognized such original locators to have a prior right to [44] acquire patent to such lands when surveyed and open to entry in a Federal Land Office. The lands here in question were so settled upon and improved. Where, without the knowledge of the settler, the land had theretofore been withdrawn from entry, it was the common practice to permit the settler, notwithstanding such withdrawal, to obtain title or to aid him in acquiring other lands in substitution. The settler, however, possessed no enforceable rights therein adverse to the Government.

The Federal Reclamation Act of June 17, 1902, as revised and amended in 1924, 43 Stat. 701, T. 43 U.S.C.A. Sec. 371 et seq., made provision for Federal aid in the reclamation of arid lands. The first Project established under this law, July 2, 1902, is known as the Truckee-Carson or Newlands Project. Following its establishment, two suits were instituted in this Court by the United States as Plaintiff to determine prior existing water rights on both the Truckee and Carson Rivers. The Project was located near Fallon approximately thirty miles from the southerly end of Pyramid Lake Indian Reservation. In what is known as the Truckee River Suit, a temporary restraining order was entered February 13, 1926, making a preliminary determination

of the then existing water appropriations theretofore made upon said River, designated Claim No. 1 etc. to No. 744. Claims Nos. 1 to 4, inclusive, relate to rights of the United States under the general designation "Government Right," Claim No. 1, subheaded: "Indian Ditch," deals with water rights "for the use and benefit of the Indians" on said Reservation to the extent of 3130 acres. Claim No. 2, subheaded "Indian Allotments," deals with water rights for such allotments when made. Claims Nos. 3 and 4 deal with the construction of a dam and canal and storage in Lake Tahoe for the Project in general. The said Restraining Order deals with the Defendant herein and defendants in other similar [45] pending actions, occupying lands within said Reservation, in the same manner as other land owners and water claimants without the limits of the Reservation.

It has been urged upon the part of the defendants in the several actions that plaintiff is not entitled to recover because the equities are in favor of the several defendants. The Court's attention has been called to a memorandum addressed to the Secretary of the Interior by the Commissioner of Indian Affairs of date December 19, 1929, and appearing in the printed report of hearings before the Committee on Indian Affairs, United States Senate in the year 1937 on Senate Bill 840, a portion of which reads:

"The white settlers have only such legal rights as were extended to them by the Act of

June 7, 1924, but their equities are unquestioned and in view of all the facts and circumstances of this case, not one of them may be charged with bad faith, and this without regard to whether the reservation be considered as established by the Commissioner's letter of 1859, the departmental withdrawal of 1861, or the Executive Order of the President in 1874. The Indians were not in possession when the white settlements were made, the boundary lines of the reservation were not clearly established, the Government offered no opposition to the settlers, and their claims were bought and sold much in the manner of privately owned lands. The new purchasers took possession, and no objection appears to have been raised by the Government."

It is the conclusion of the Court that it is unnecessary to consider the question of the equities of the case otherwise than any possible bearing which they may have in the construction of the statute in question. The statute, by section 1, confers power in the Secretary of the Interior "to sell to settlers or their transferees, under such terms, conditions, and price per acre as the said Secretary may prescribe * * * ; Provided further, That said sales shall be by private cash entry * * * ." By section 4, it is provided that all sales * * * shall be made through the local land office within ninety days after the price of the land shall have been fixed by the Secre-

tary of the Interior; Provided, That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof * * * .”

The use of the words “terms” and “conditions,” clearly show that in order to effect an entry upon the occupied lands where, as in this case, the total price therefor is not required to be paid in full at one time but a part cash payment only is required and time or times allowed for subsequent cash payments with interest to accrue thereon, a prescribed cash payment on account of the total purchase price, made within the ninety days period, effects an entry within the clear meaning of the statute. We here have a special statute to consider dealing with an unusual situation respecting the public lands. The statute requires that sales shall be made through the local land office within ninety days after the price of the land shall have been fixed and that where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof. Where, as in this case, under the terms and conditions of the sale, an initial part payment only was required, then, unless that part payment be deemed to constitute the “entry” required to be made within ninety days, then a legal entry, under the terms and conditions as prescribed by the Secretary of the Interior would not be effected although subsequent payments were made within the times specified. In the view of the Court, the statute was correctly construed by the

Secretary of the Interior in this respect and that the partial payment made constituted entry within the meaning of the statute. Another consideration supporting this view is that the statute placed no limitations on the sale price to be fixed by the Secretary and the price as fixed was in excess of those required in ordinary sales of land within the public domain. The initial payment was in excess of such amount. [47]

We come now to the question whether a subsequent default or defaults in deferred payments would present a condition which would require the United States to "enter upon the premises and take possession thereof." This requirement, however, only exists "where entry is not made within the time specified." Such default or defaults would not require such drastic remedy to fully protect the interests of the United States in the sale agreement. We are here dealing with a special statute authorizing land sales "under such terms, conditions and price as the said Secretary may prescribe." If, as in this case, an agreement of sale is entered into and part payment made, default in other payments may be enforced and, if not otherwise paid with interest and costs all interest or equities in the land in question would be liable therefor and if payments not made, all equities of the settler could be terminated. Delay in payments, according to the answer, were due to financial difficulties occasioned in whole or in part by the depression. As soon as money could be raised it was tendered. It is not the

policy of the Government to enforce strictly the provisions of the land laws against settlers on the public domain where circumstances, like those occasioned during a period of depression, may make it difficult for such settlers to comply. See statutes dealing with such conditions during the years 1929 to 1936, inclusive, in so far as homestead settlers or entrymen were concerned. T. 43 U.S.C.A., Secs. 237a to 237e.

It is the conclusion of the Court that plaintiff is not entitled to the judgment prayed for in the complaint or any judgment in this action; that the defendant is entitled to judgment to the effect that its tender be accepted and that it is entitled to receive patent for said land. It is, therefore, ordered that judgment be entered accordingly.

Dated this 8th day of March, 1941.

(Signed) FRANK H. NORCROSS,
District Judge.

[Endorsed]: Filed March 8th, 1941. [48]

(Title of District Court and Cause.)

NOTICE OF MOTION.

To the Above-Named Defendants, and to Wm. M. Kearney, Esq., Their Attorney:

You and Each of You Will Please Take Notice: That the plaintiff will, by its attorneys, at the Court-room of the above-entitled Court, in the Federal Building, Room 310, at Reno, Washoe County, State and District of Nevada, on Friday, the 11th day of April, 1941, at the hour of 2:00 o'clock P. M. of said day, or as soon thereafter as counsel can be heard, move said Court to reconsider its Opinion and Decision filed in the above-entitled cause on March 8, 1941.

That said Motion will be made upon the grounds and for the reasons as set forth in the written Motion filed in the above-entitled Court and cause, a true and correct copy of which motion is attached hereto, and made a part hereof.

You Will Further Take Notice: That at the hearing of said Motion, counsel will rely upon all of the pleadings and [49] other papers on file in said cause, upon said Motion, and upon this Notice of Motion.

You Will Further Take Notice: That the relief sought by said Motion is for the Court to reconsider its said Opinion and Decision, and for an Order that a judgment be rendered for and on behalf of plaintiff.

Dated: This 3rd day of April, 1941.

MILES N. PIKE,

United States Attorney.

Due receipt and service of the foregoing Notice of Motion, and Motion, by copy, is hereby admitted this 3rd day of April, 1941.

WM. M. KEARNEY.

[Endorsed]: Filed April 3rd, 1941. [50]

(Title of District Court and Cause.)

MOTION FOR RECONSIDERATION OF
OPINION AND DECISION

Filed March 8, 1941.

Comes now the United States of America by its attorneys and moves this honorable court to reconsider its opinion and decision filed in the above-entitled cause on March 8, 1941, and for reason therefor says:

1. That the court is without jurisdiction to enter a judgment requiring the United States of America to accept defendants' tender or to issue a patent to the defendants, since the United States has not consented to be sued.

2. That the order for judgment is erroneous and contrary to law in that it concedes the existence of rights in the United States, but refuses enforcement of those rights, and by operation of the doctrine of res judicata destroys those rights.

3. That the order for judgment denying relief

to the United States but requiring the acceptance of defendants' tender and the issuance of a patent to defendants is erroneous and contrary to law, since it leaves defendants without [51] obligation to renew their tender and leaves the United States without power to compel payment or, in the alternative, to recover the land.

4. That the order for judgment is erroneous and contrary to law in that it denies to the United States the relief to which it is entitled, namely, the possession of the land in suit.

UNITED STATES OF AMERICA
By MILES N. PIKE

United States Attorney for
the District of Nevada.

Service of copy admitted this 1st day of April,
1941.

W. M. KEARNEY

[Endorsed]: Filed April 2, 1941. [52]

[Title of District Court and Cause.]

MINUTES OF COURT
of Monday, June 2, 1941

Plaintiff's Motion for Reconsideration of Opinion and Decision having been argued, submitted on briefs and by the Court taken under advisement, it is ordered that plaintiff's motion for reconsideration of opinion and decision be, and the same hereby is, denied. An exception to this ruling is granted counsel for the plaintiff. [53]

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now comes the plaintiff in the above-entitled action and requests the court to enter findings of fact and conclusions of law in this case pursuant to Rule 52(a) and suggests and requests that the court enter the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This is an action brought by the United States to recover land now occupied under a claim of ownership by the defendant Garaventa Land & Livestock Company and which consists in the following parcels:

T. 20 N., R. 24 E., M. D. M., Nev., Sec. 4 NE SW, NW SW, SW SW, SE SW, S $\frac{1}{2}$ SW NW, S $\frac{1}{2}$ SE NW, Sec. 9, Lot 17, containing 236.14 acres.

These tracts of land are located within the boundaries of the [54] Pyramid Lake Indian Reservation, which was created on November 29, 1859, by executive order.

2. On June 7, 1924, the defendant, Garaventa Land and Livestock Company was in possession of the lands and it and its grantors and predecessors in interest had been in possession for sixty or more years, the earliest occupation of settlers thereon being about the year 1863 and after the withdrawal

of the lands from the public domain by the establishment of the Pyramid Lake Indian Reservation.

3. The defendant has never paid the United States anything for the use and occupancy of the lands.

4. The defendants have never established or sought to establish any rights to the land under any act of Congress except that approved on June 7, 1924 (43 Stat. 596).

5. On February 7, 1925, the First Assistant Secretary of the Interior approved the report of examiners appointed to classify and appraise the lands above described which report contained an appraisal of the lands at \$7,395.70. The Assistant Secretary ruled that the claimants should have 90 days from February 7, 1925, within which to pay the appraised price of the land to the Register and Receiver of the General Land Office, together with the fees and commissions.

6. On May 1, 1925, the following telegram of the Commissioner of the Land Office, approved by the Secretary of the Interior, was sent to the Register and Receiver at Carson City, Nevada:

Referring to Regulations of March 3, 1925, Pyramid Lake Indian lands allow settlers making application on or before May 8, 1925, to pay all cash or one-fourth down balance in three equal annual installments with interest on deferred installments at five percent per annum. [55]

On May 7, 1925, the Secretary of the Interior wired the Register and Receiver of the General Land Office in Carson City, Nevada, the following:

Matter Pyramid Lake lands, settlers required to pay one-fourth down with application. If any applications filed by people unable to make full one-fourth payment tomorrow, you are authorized to receive payment of such part of amount as they are able to make, if accompanied by promise to raise additional amount and pay same within 30 days. In such cases, receive and suspend the application pending payment of the full one-fourth within the specified time.

Pursuant to such appraisements and revised regulations the defendant, Garaventa Land & Livestock Company made application on May 7, 1925, to purchase the described land and filed the affidavits required by the regulations of the Department of the Interior, and paid \$1,853.92, which was \$5.00 more than one-fourth of the purchase price. On September 16, 1925, the General Land Office allowed the application. To date no further payment or tender of payment on this entry has been made by the defendant company.

7. On December 29, 1931, the defendant company received notification by mail that the Commissioner required payment of one-third of the deferred payments together with one-third of the accrued interest on or before January 31, 1932, and the balance to be paid in two equal annual installments. The letter further stated that if the first payment

was not made on or before January 31, 1932, or an appeal filed, the purchase would be cancelled and the money already paid in forfeited. No payment was made pursuant to this letter.

On November 30, 1934, the Department reduced the purchase price to \$4,005.70 and reduced the interest from 5 percent to 4 percent retroactively to December 31, 1934, and the original payment was to be applied to the reduced purchase price. On May 24, [56] 1935, a notice was again sent to the defendant company notifying it that if it failed to make payment within thirty days of the reduced purchase price, with interest, or interest alone, or an appeal taken, the entries would be cancelled and all moneys previously paid forfeited. No payment was made, but an appeal was taken on the ground that since the appraisal of the land the value had greatly depreciated so that the appraisals now exceeded the market value of the land. Upon the appeal the First Assistant Secretary of the Interior ruled: (1) that all interest must be paid within thirty days, (2) that one-third of the unpaid principal must be paid within six months, (3) that the unpaid principal would be computed on the basis of the reduced purchase price and (4) that interest would be computed by the General Land Office from the date of default.

8. On March 10, 1936, the defendant company received from the Commissioner a letter stating:

A recomputation shows \$2,151.78 purchase money due and unpaid as of September 16,

1928, together with interest at four percent from September 16, 1926, to date of payment which, if the principal is not paid until March 31, 1936, will amount to \$701.09.

The same letter advised that the defendant company was allowed thirty days within which to pay the \$701.09, in default of which payment the entries would be cancelled without further notice from the General Land Office. On May 13, 1936, no payment having been made, the Commissioner of the General Land Office cancelled the entries. By letter dated June 2, 1936, the defendant company was given notice, received by it on June 5, 1936, to vacate on or before September 30, 1936, the lands covered by its entry.

CONCLUSIONS OF LAW

I.

Under the Act of June 7, 1924, the defendant was entitled [57] to purchase the land by cash entry within 90 days of February 7, 1925, the date of approval of the appraisal by the First Assistant Secretary of the Interior.

II.

The extensions of time for payment granted by the Secretary of the Interior, if they had any effect at all, merely deferred the operation of the provision of the Act of June 7, 1924, requiring the United States to enter upon and take possession of

the land upon the failure of the defendant to comply with the statute. Upon the expiration of the last extension and the failure of the defendant to comply with the statute the rights of the defendants terminated and it became the duty of the United States to take possession of the land as required by the statute. This suit was properly brought for that purpose.

III.

The United States is entitled to judgment as prayed in its complaint.

Respectfully submitted,

THOMAS O. CRAVEN

Asst. United States Attorney
for the District of
Nevada

[Endorsed]: Filed June 4, 1941. [58]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Garaventa Land and Livestock Co., a corporation, Joe Garaventa, Louise Garaventa, his wife, Frank Garaventa and William Garaventa, First Doe, Second Doe, Third Doe and Fourth Doe, the above named defendants, and William M. Kearney and Douglas A. Busey, their attorneys.

You and Each of You will take notice that the plaintiff, United States of America, hereby appeals

from the judgment rendered in the above entitled court and cause on the 8th day of March, 1941, and the whole thereof, to the Circuit Court of Appeals for the Ninth Circuit.

Dated: June 7, 1941.

MILES N. PIKE

United States Attorney

By: THOMAS O. CRAVEN

Ass't. U. S. Attorney

[Endorsed]: Filed June 7, 1941. [59]

[Title of District Court and Cause.]

MOTION.

Comes Now the Plaintiff, the United States of America, by and through Miles N. Pike, United States Attorney, and moves the above entitled Court for an Order extending its time to, and including, the 4th day of September, 1941, for filing the Record on Appeal in the above-entitled cause with the United States Circuit Court of Appeals for the Ninth Circuit, and the docketing of said above-entitled cause therein.

MILES N. PIKE

United States Attorney

Attorney for Plaintiff

303 Federal Building

Reno, Nevada

[Endorsed]: Filed June 30, 1941. [60]

[Title of District Court and Cause.]

ORDER.

On Motion of Miles N. Pike, United States Attorney, and good cause appearing therefor, It Is Hereby Ordered that the Plaintiff, the United States of America, have to, and including, the 4th day of September, 1941, within which to file with the United States Circuit Court of Appeals for the Ninth Circuit the Record on Appeal in the above-entitled action and the docketing of said action therein.

Dated at Reno, Nevada, this 30th day of June, 1941.

FRANK H. NORCROSS

District Judge.

[Endorsed]: Filed June 30, 1941. [61]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

This action was filed by the United States in the above-entitled court on the 4th day of February, 1938, for the recovery of the possession of lands and premises described in the complaint as follows, to-wit:

NE $\frac{1}{4}$ of SW $\frac{1}{4}$, NW $\frac{1}{4}$ of SW $\frac{1}{4}$, SW $\frac{1}{4}$ of SW $\frac{1}{4}$, SE $\frac{1}{4}$ of SW $\frac{1}{4}$, S $\frac{1}{2}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$, in the S $\frac{1}{2}$ of SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and Lot 17

of Section 9, all in Township 20 North, Range 24 East, M. D. B. & M., containing 236.14 acres.

1. That in the year 1861, the said lands were settled upon and occupied by the grantors and predecessors in interest of defendant, Garaventa Land & Livestock Company, a corporation, and ever since said date have been and still are occupied by defendant, Garaventa Land & Livestock Company, and its predecessors in interest.

2. That immediately after occupancy, the predecessors of said defendant improved said lands for farming purposes, and buildings, fences, and improvements were constructed thereon; [62] that the Truckee River, a natural stream, is adjacent to the said lands and that artificial dams and ditches were constructed to appropriate and divert water into ditches, by the predecessors in interest of the defendant, Garaventa Land & Livestock Company, and the said lands were cleared and broken from their raw state and the same were planted to agricultural crops; that by means of the waters so diverted from said Truckee River through said artificial ditches crops were produced on said lands. That said crops were produced each and every year since about the year 1864; that at the time the said lands were settled upon, in the year 1861, the public surveys had not been extended to include said lands and the same were open and unsurveyed.

3. That at the time of the original settlement upon said lands by the predecessors of the defend-

ant, Garaventa Land & Livestock Company, the Piute Indians, for whom the plaintiff is now claiming rights on the Pyramid Lake Indian Reservation, were a warlike tribe and were at war with the Whites.

4. That on May 12, 1860, what is known as the General Ormsby Massacre took place wherein the Piute Indians massacred a number of White men on the Truckee River in the immediate vicinity of the lands described herein. Isaac Roop, Governor of Nevada Territory, addressed a letter to General Clarke, Department of Pacific, predicting war with the Piutes because of the murder of eight White men by the Piute Indians. In the year 1862, the territorial legislature of Nevada adopted a memorial to Congress relative to the depredations committed by Indians in the Territory of Nevada, asking the appointment of a commission to consider reimbursement of the settlers of Nevada and California for their expenses in protecting the settlements; [63] that said depredations so committed by the Indians were in the vicinity of the lands described in the complaint herein. The legislature of Nevada of 1865 passed a joint resolution asking for a Federal military force to protect the Overland Trail and mail route from Nevada to the Missouri River against hostile Indians. Contained in said resolution is the following:

“The Indian massacres which occurred in the summer and fall of 1864 will now be re-enacted.” (Stats. 1864-65, page 462.)

In the year 1866, the legislature of Nevada passed a joint memorial addressed to Major Halleck, commanding Department of Pacific, asking a suitable force of cavalry, etc., to repress the depredations of hostile Indians in Nevada, declaring there had been depredations "every year since the settlement of the territory." (Nev. Laws, 1866, page 267).

"That in May and June, 1861, the Overland Mail and immigrant routes were attacked by Indians and communications closed between the Atlantic states and Pacific coast." (Report to United States Senate on rebellion war claims of Nevada.)"

That there is no treaty between the Piute Indians and the United States respecting Pyramid Lake Indian Reservation.

5. That the United States Public Land surveys were extended to subdivide said lands in the year 1866; that in the year 1869 the United States issued patents to lands adjacent and contiguous to the lands described in the complaint, to-wit:

Lands in Sections 4, 8 and 9, Township 20 North, Range 24 East, M. D. B. & M., and also Sections 22 and 28 of Township 21 North, Range 24 East, M. D. B. & M., which are now embraced within the boundaries designated as the Pyramid Lake Indian Reservation.

The first improvements by the United States on Pyramid Lake Indian Reservation were begun many years after the defendant's predecessors had

settled upon the said lands referred to in the complaint. [64]

6. That the Town of Wadsworth, Washoe County, Nevada, is situated in part on Section 4 of Township 20 North, Range 24 East, M. D. B. & M., on lands to which the United States has issued patent; that from the year 1869, until the year 1904, the Southern Pacific Railroad Company maintained the railroad division point at said Towns of Wadsworth in said Section 4, on lands to which United States patents had been issued.

7. By Executive Order of March 23, 1874, the Pyramid Lake Indian Reservation was established; that at the date of the establishment of said reservation and ever since the year 1861, the lands referred to in the complaint herein have been occupied and improved by predecessors in interest of defendants and the Piute Indians never have had possssion of the same.

That in the year 1865, the exterior boundaries of the Pyramid Lake Indian Reservation were established by survey, which survey included the lands referred to in the complaint. That on May 13, 1865, the Department of the Interior directed that the southerly boundary of the said reservation be moved to a point ten miles north of that previously fixed by said survey so as to place the lands referred to in the complaint and other lands settled upon by Whites outside the boundaries of the Pyramid Lake Indian Reservation. Subsequently, on August 17, 1865, said order was revoked. Neither the Piute

Indians nor the United States have been in the actual possession of any of the lands referred to in the complaint; that no effort was made to remove the defendant's predecessors in interest or the defendant from said lands prior to the year 1909. In the year 1916, actions for ejectment were instituted in the United States District Court of the District of Nevada against the defendant herein and other settlers. That the Department of the Interior [65] requested the Attorney General to postpone action on the pending suits against the said defendants until a further investigation could be made by the Department. That on June 7, 1924, the Congress of the United States passed an act entitled "An Act for the Relief of Settlers and Townsite Occupants of certain lands in the Pyramid Lake Indian Reservation, Nevada, being Chapter 311, Public Laws of the United States of America (43 Stats. 596, Chap. 311); that pursuant to said act, defendant Garaventa Land & Livestock Company, a qualified applicant, made application to the Department of the Interior to purchase the lands described in the complaint, which application was approved; that the purchase price, fixed for said land under said act, was \$4,005.70 plus interest at the rate of four per cent (4%) per annum fully paid. That the said defendant paid on account of said purchase price in June, 1925, the sum of \$1,853.92 as the initial payment and continued to occupy and farm said lands as theretofore; that the said lands described in the complaint are intermingled with

patented lands owned in fee by the defendant, all of which form a single ranch unit and developed as a unit, and which was developed as a single ranch and irrigated through an individual ditch; that the dams, ditches and water rights used upon said lands are owned by the defendant, Garaventa Land & Livestock Company.

8. That the land involved in the complaint herein is situated at the extreme southerly border of the Inidan Reservation about twenty-five miles distant from Pyramid Lake and about twenty miles distant from the nearest portion of the reservation occupied by the Indians. That the Indians have restricted their occupation to the area known as the agency twenty miles to the north at or near Pyramid Lake. The defendant and other settlers who made application [66] to purchase the lands under said act of June 7, 1924, vigorously protested the prices of said lands fixed by the appraisers and a new inspection and appraisalment was made and the prices were reduced and the settlers authorized to make payment in four installments. The settlers were contending for a price not to exceed \$2.50 per acre for the raw land and continued to ask for relief; that the said defendant and other settlers upon said lands were encouraged to believe by acts and conduct of the Department of the Interior that they would be granted relief by the Department of the Interior or by Congress; that the defendant relied upon said acts and conduct in continuing to develop the land; that plaintiff waived a series of

defaults by defendant and others similarly situated and defendant reasonably believed that forfeiture would not be claimed; that negotiations were continuous with the Department of the Interior and through bills and resolutions introduced in Congress to obtain the relief the settlers desired up until the institution of this suit; that after the making of said contracts of purchase, extensions of time were granted to the said defendant within which to pay the balance of the installments based on said appraisal price, while negotiations were under way and Congressional action pending for a reduced appraisal value comparable with the price paid for similar lands by settlers on the public domain.

The Federal Reclamation Act of June 17, 1902, as revised and amended in 1924, 43 Stat. 702, T. 43 U. S. C. A. Sec. 371 et seq., made provision for Federal aid in the reclamation of arid lands. The first Project established under this law, July 2, 1902, is known as the Truckee-Carson or Newlands Project. Following its establishment, two suits were instituted in this court by the United States as Plaintiff to determine prior existing water rights on both the Truckee and Carson Rivers. The [67] Project was located near Fallon approximately thirty miles from the southerly end of Pyramid Lake Indian Reservation. In what is known as the Truckee River Suit, a temporary restraining order was entered February 13, 1926, making a preliminary determination of the then existing water appropriations theretofore made upon said River, des-

ignated Claim No. 1 etc. to No. 744. Claims Nos. 1 to 4, inclusive, relate to rights of the United States under the general designation "Government Rights," Claim No. 1, sub-headed: "Indian Ditch," deals with water rights "for the use and benefit of the Indians" on said Reservation to the extent of 3130 acres. Claim No. 2, subheaded "Indian Allotments," deals with water rights for such allotments when made. Claims Nos. 3 and 4 deal with the construction of a dam and canal and storage in Lake Tahoe for the Project in general. The said Restraining Order deals with the Defendant herein and defendants in other similar pending actions, occupying lands within said Reservation, in the same manner as other land owners and water claimants without the limits of the Reservation.

That the water rights for the lands described in the complaint are owned by and have been decreed to the defendant Garaventa Land & Livestock Company in the above suit, in which the plaintiff was a party.

9. That in the year 1930, the defendant was heavily indebted and because of the nationwide financial depression, beginning with the year 1930 and continuing for four or more years, the said defendant could not raise sufficient funds to complete said payments; that during all of said period, the defendant's lands and other assets were heavily mortgaged and because of the depreciated values of livestock and farm products, the defendant could not raise additional funds to make said payments;

that the said defendant carried on negotiations with the department for further extensions to enable it to obtain sufficient funds to pay said [68] balance. That on or about May 13, 1936, the Department of the Interior gave notice to the said defendant that its right to purchase said lands was cancelled; that during said period up to date of said notice of cancellation, the said defendant was actively carrying on negotiations to raise said balance of the purchase price and shortly after said notice was received, the negotiations to raise said purchase price were successful and the said defendant offered to pay the said balance of the purchase price, together with interest in full, and the same was tendered to the Register of the United States Land Office but said officers refused to accept said payment and still and now refuse to accept the same. That the said defendant has at all times kept the said tender and payment good and still and now offers to pay said purchase money with interest in full.

10. That the sale price fixed by the Secretary of the Interior under the said Act of June 7, 1924, is far in excess of the ordinary sales prices of similar land on the public domain; that the initial payment made by the defendant on said purchase was in excess of the total amount which would be required if based on prices fixed by Congress for settlers on the public domain. That areas of raw and undeveloped Government land adjacent to the lands described in the complaint have heretofore been disposed of by the Government at \$1.25 per acre to

settlers under homestead and other public land acts. The defendant has already paid \$7.85 an acre for said land.

A memorandum addressed to the Secretary of the Interior by the Commissioner of Indian Affairs of date December 19, 1929, and appearing in the printed report of hearings before the Committee on Indian Affairs, United States Senate in the year 1937 on Senate Bill 840, reads in part: [69]

“The white settlers have only such legal rights as were extended to them by the Act of June 7, 1924, but their equities are unquestioned, and in view of all the facts and circumstances of this case, not one of them may be charged with bad faith, and this without regard to whether the reservation be considered as established by the Commissioner’s letter of 1859, the departmental withdrawal of 1861, or the Executive Order of the President in 1874. The Indians were not in possession when the white settlements were made, the boundary lines of the reservation were not clearly established, the Government offered no opposition to the settlers, and their claims were bought and sold much in the manner of privately owned lands. The new purchasers took possession, and no objection appears to have been raised by the Government.”

Basis of recovery is alleged failure to comply with the provisions of the Act of Congress of June

7, 1924, entitled "An act for the relief of settlers and town-site occupants of certain lands in the Pyramid Lake Indian Reservation, Nevada," 43 U. S. Stats. 596, Title 25, U. S. C. A., p. 344, and regulations promulgated thereunder. Section 1 of said Act provides:

"That the Secretary of the Interior is hereby authorized to sell to settlers or their transferees, under such terms, conditions, and price per acre as the said Secretary may prescribe, any lands * * * that have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act: * * * Provided further, That said sale shall be by private cash entry after it has been shown * * * that the lands applied for have been settled upon, occupied, and improved as required by this Act. * * * The proceeds of said sales shall be * * * for the Piute Indians of the said Pyramid Lake Indian Reservation."

Section 2 of said Act deals with sales of lands in the town of Wadsworth within said Reservation. Section 3 provides:

"That titles to lands * * * acquired by patents heretofore issued by the United States to any railroad company, individual, or the State of Nevada, or by certification of the State of Nevada, are hereby confirmed." [70]

Section 4 provides:

“All sales in accordance with section 1 of this act shall be made through the local land office within ninety days after the price of the lands shall have been fixed by the Secretary of the Interior: Provided, That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation.”

The use of the words “terms” and “conditions,” clearly show that in order to effect an entry upon the occupied lands where, as in this case, the total price therefor is not required to be paid in full at one time but a part cash payment only is required and time or times allowed for subsequent cash payments with interest to accrue thereon, a prescribed cash payment on account of the total purchase price, made within the ninety days period, effects an entry within the clear meaning of the statute.

In this case, under the terms and conditions of the sale, an initial part payment only was required.

The partial payment in this case constituted entry within the meaning of the statute.

Subsequent default or defaults in deferred payments do not present a condition requiring the United States to enter upon the premises and take possession thereof. Such requirement exists only where entry is not made within the time specified.

It is not the policy of the United States to seek forfeiture under circumstances such as are here presented.

11. On March 10, 1936, the defendant received a letter from the Commissioner of the General Land Office, stating, among other things:

“A recomputation shows \$2,151.78 purchase money due and unpaid as of September 16, 1928, together with interest at 4% per annum from September 16, 1926, to date of payment which, if the principal is not paid until March 31, 1936, will amount to \$701.09.” [71]

CONCLUSIONS OF LAW.

1. That under the Act of June 7, 1924 (Title 25 U. S. C. A., page 344, Rev. U. S. Stats. 596), plaintiff is not entitled to cancel the contract of sale of said lands entered into with the defendant, Garaventa Land & Livestock Company, and that it would be inequitable and unjust to require or permit the cancellation of such contract of sale or to disturb the defendant's possession of said lands.

2. That the plaintiff is not required to issue patent to said lands, except upon receipt and acceptance of the money tendered by the defendants as the balance of the purchase price of said lands, together with interest thereon.

That the plaintiff is not entitled to deprive defendant of the occupancy of said lands.

3. That the plaintiff, United States of America, is not entitled to judgment for the relief prayed

for in said complaint and that the same should be dismissed.

Dated: _____, 1941.

United States District Judge.

Service of the foregoing Findings of Fact and Conclusions of Law, by copy, is hereby admitted this 24th day of July, 1941.

/s/ JOHN S. HALLEY
Asst. U. S. Atty.

[Endorsed]: Lodged July 25, 1941. [72]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW REQUESTED
BY PLAINTIFF.

Comes now the defendant, Garaventa Land & Livestock Company, a corporation, and hereby objects to the findings of fact requested by plaintiff upon the following grounds and moves that the same be rejected:

(a) That the plaintiff's requested findings are not in accordance with the evidence adduced on the trial of said cause; that said requested findings do not set forth the facts upon which the court relied in rendering his decision.

(b) That the said request for findings was not made within the time prescribed by law and that

the written opinion and decision of the court entered and filed on March 8, 1941, became and constitutes the findings and entry of judgment of the court under Rule 79A in that the same was entered in the Civil Docket on said date, to-wit, March 8, 1941, and constitutes the judgment herein; that no motion was made within the time fixed [73] by law or the rules of the court (52B) to amend its findings or make additional findings or to amend the judgment, nor was any motion made for a new trial pursuant to Rule 59, in which said request was made to amend said findings or make additional findings.

In the event the court determines not to have the opinion and decision stand as the findings, defendant proposes the findings accompanying these objections.

Dated: July 23, 1941.

WM. KEARNEY

Attorney for Defendant,
Garaventa Land and Live-
stock Company.

Service of the foregoing Objections, by copy, is hereby admitted this 24th day of July, 1941.

/s/ JOHN S. HALLEY

Asst. United States Attorney.

[Endorsed]: Filed July 25, 1941. [74]

At a Stated Term, to wit: The October Term 1940, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday the thirty-first day of July in the year of our Lord one thousand nine hundred and forty-one.

Present:

Honorable Curtis D. Wilbur, Senior Circuit Judge,
Presiding,

Honorable Francis A. Garrecht, Circuit Judge,
Honorable William Healy, Circuit Judge.

UNITED STATES OF AMERICA,

Appellant,

vs.

GARAVENTA LAND AND LIVESTOCK CO., a
Corporation, et al.,

Appellees.

ORDER REMANDING CAUSE TO DISTRICT
COURT, ETC.

Upon consideration of the petition of Honorable Frank H. Norcross, United States District Judge for the District of Nevada, for an order remanding this cause to said District Court for further proceedings, and good cause therefor appearing,

It Is Ordered that said petition be, and hereby is granted, and that this cause be, and hereby is re-

manded to the said District Court for the District of Nevada, and that said Honorable Frank H. Norcross, as Judge of said District Court be, and he hereby is authorized to settle, make and enter findings of fact and conclusions of law on or before the 25th day of August, 1941, and for such other and further orders as he, the said District Judge, may deem proper.

I Hereby Certify that the foregoing is a full, true and correct copy of an original Order made and entered in the within-entitled Cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 31st day of July, 1941.

[Seal]

PAUL P. O'BRIEN

Clerk, U. S. Circuit Court
of Appeals for the Ninth
Circuit

[Endorsed]: Filed Aug. 1st, 1941. [75]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW PROPOSED BY
DEFENDANT.

Comes now the plaintiff in the above-entitled action and objects to the following numbered findings of fact proposed by the defendant, Garaventa Land & Livestock Company, and the conclusions of law

so proposed by said defendant, on the ground that said findings of fact are contrary to the evidence adduced on the trial of the above-entitled cause, and that said conclusions of law are contrary to law and to the evidence, and respectfully moves that the following findings be stricken;

(a) That part of finding No. 7, (Page 5), which states:

“* * * that the purchase price, fixed for said land under said act, was \$4,005.70 plus interest at the rate of four per cent (4%) per annum fully paid. That the said defendant paid on account of said purchase price in June, 1925, the sum of \$1,853.92 as the initial payment and continued to occupy and farm said lands as theretofore; * * *”

(b) That part of finding No. 8, (Pages 5 and 6), which states:

“The defendant and other settlers who made application to purchase the lands under said act of [76] June 7, 1924, vigorously protested the prices of said lands fixed by the appraisers and a new inspection and appraisal was made and the prices were reduced and the settlers authorized to make payment in four installments. The settlers were contending for a price not to exceed \$2.50 per acre for the raw land and continued to ask for relief; that the said defendant and other settlers upon said lands were encouraged to believe by acts and

conduct of the Department of the Interior that they would be granted relief by the Department of the Interior or by Congress; that the defendant relied upon said Acts and conduct in continuing to develop the land; that plaintiff waived a series of defaults by defendant and others similarly situated and defendant reasonably believed that forfeiture would not be claimed; that negotiations were continuous with the Department of the Interior and through bills and resolutions introduced in Congress to obtain the relief the settlers desired up until the institution of this suit; that after the making of said contracts of purchase, extensions of time were granted to the said defendant within which to pay the balance of the installments based on said appraisal price, while negotiations were under way and Congressional action pending for a reduced appraisal value comparable with the price paid for similar lands by settlers on the public domain.”

That in lieu of the above portion of findings Nos. 7 and 8, and hereinabove set-out, it is respectfully requested that the above-entitled Honorable Court make, and enter the following finding of fact:

“Twelve settlers filed applications to purchase pursuant to the provisions of the act of June 7, 1924 (43 Stat. 596) and seven ultimately fulfilled all requirements and received patents.

The particular facts relating to the defendant's application are as follows:

The Secretary of the Interior in 1925 approved a classification and appraisal of the lands fixing prices ranging from \$3 an acre for nonirrigable land to \$75 an acre for irrigable land. He rejected an earlier classification and appraisal by a Mr. Trowbridge fixing prices ranging from \$3 to \$5 an acre for nonirrigable land to \$20 to \$30 an acre for irrigable land. March 3, 1925, the Secretary approved regulations directing that the settlers be allowed 90 days to file applications and pay the full appraisal price. May 1, 1925, he modified the regulations to allow the settlers to pay either the full appraisal [77] price or one-fourth down and the balance in three equal annual instalments with interest on deferred payments at five per cent.

March 7, 1925, the defendant filed an application and made a quarter payment of \$1,853.92 on a full appraisal price of \$7,395.70. September 16, 1925, the General Land Office allowed the application. The defendant defaulted on the deferred payments, but, because of economic conditions and the pendency of proposed legislation to reduce the purchase price, the General Land Office refrained from cancelling its application. September 26, 1931, however, the General Land Office directed that the defendant be allowed 90 days from notice within

which to pay the full deferred balance and interest. December 29, 1931, before the 90-day period expired, the General Land Office revoked the previous notice and notified the defendant that it was allowed until January 31, 1932, to pay one-third of the outstanding balance, and interest, and that, in case of default and in the absence of an appeal to the Secretary of the Interior, its application would be cancelled, all moneys paid forfeited and the case closed without further notice. Thereafter the General Land Office suspended action on the defendant's application pending consideration of S. Res. 142 which required the Department of the Interior to withhold collections from the settlers until a Senate Committee could investigate the situation as to the appraisals in effect.

May 24, 1935, the General Land Office advised the defendant that the appraisals in effect had been cancelled and the earlier Trowbridge appraisals adopted; that the purchase price for the land it was seeking to purchase was accordingly reduced from \$7,395.70 to \$4,005.70, thus leaving due and unpaid \$2,151.78 after credit given for the \$1,853.92 previously paid; that it was allowed 30 days to make full payment of principal and interest or to pay the interest only; and that the application would be cancelled without further notice if such payment was not made or an appeal taken to the Secretary.

July 10, 1935, the defendant appealed to the Secretary for a further reduction of the appraisal price in the light of existing economic conditions. March 10, 1936, the General Land Office notified the defendant that the Secretary had ruled that all interest due on the unpaid principal was required to be paid within 30 days; that one-third of the principal due based on the 1934 re-appraisal was required to be paid within 6 months; and that, failing this, the application would be cancelled without further notice. The defendant failed to pay the interest as required and May 13, 1936, the Secretary cancelled its application."

Plaintiff further respectfully moves that the following portion of finding of fact No. 10, (Pages 9 and 10), [78] proposed by the defendant, Garaventa Land and Livestock Company, be stricken, upon the ground that the same is a conclusion of law and not a finding of fact:

"* * * Basis of recovery is alleged failure to comply with the provisions of the Act of Congress of June 7, 1924, entitled 'An act for the relief of settlers and town-site occupants of certain lands in the Pyramid Lake Indian Reservation, Nevada,' 43 U. S. Stats. 596, Title 25, U. S. C. A., p. 344, and regulations promulgated thereunder. Section 1 of said Act provides:

'That the Secretary of the Interior is hereby authorized to sell to settlers or their trans-

ferees, under such terms, conditions, and price per acre as the said Secretary may prescribe, any lands * * * that have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act: * * * Provided further, That said sale shall be by private cash entry after it has been shown * * * that the lands applied for have been settled upon, occupied, and improved as required by this Act. * * * The proceeds of said sales shall be * * * for the Piute Indians of the said Pyramid Lake Indian Reservation.'

Section 2 of said Act deals with sales of lands in the town of Wadsworth within said Reservation.

Section 3 provides:

'That titles to lands * * * acquired by patents heretofore issued by the United States to any railroad company, individual, or the State of Nevada, or by certification of the State of Nevada, are hereby confirmed.'

Section 4 provides:

'All sales in accordance with section 1 of this act shall be made through the local land office within ninety days after the price of the lands shall have been fixed by the Secretary of the Interior: Provided, That where entry is not made within the time specified, the United States shall enter upon the premises and take

possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation.'

The use of the words 'terms' and 'conditions' clearly show that in order to effect an entry upon the occupied lands where, as in this case, the total price therefor is not required to be paid in full at one time but a part cash payment only is required and time or times allowed for subsequent [79] cash payments with interest to accrue thereon, a prescribed cash payment on account of the total purchase price, made within the ninety days period, effects an entry within the clear meaning of the statute.

In this case, under the terms and conditions of the sale, an initial part payment only was required.

The partial payment in this case constituted entry within the meaning of the statute.

Subsequent default or defaults in deferred payments do not present a condition requiring the United States to enter upon the premises and take possession thereof. Such requirement exists only where entry is not made within the time specified. It is not the policy of the United States to seek forfeiture under circumstances such as are here presented. * * *

The plaintiff does hereby object to defendant's, Garaventa Land and Livestock Company's, proposed conclusions of law, on the ground and for the

reason that the same are contrary to law and to the evidence adduced at the hearing of the above-entitled cause.

Plaintiff respectfully requests that the description of the lands set-out in defendant's proposed findings of fact and conclusions of law be corrected so as to read as follows:

“NE $\frac{1}{4}$ of SW $\frac{1}{4}$, NW $\frac{1}{4}$ of SW $\frac{1}{4}$, SW $\frac{1}{4}$ of SW $\frac{1}{4}$, SE $\frac{1}{4}$ of SW $\frac{1}{4}$, S $\frac{1}{2}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$, S $\frac{1}{2}$ of SE $\frac{1}{4}$ of the NW $\frac{1}{4}$, Sec. 4 and Lot 17 of Section 9, all in Township 20 North, Range 24 East, M. D. B. & M., Washoe County, State and District of Nevada, containing 236.14 acres.”

Respectfully submitted,

MILES N. PIKE,

United States Attorney

By JOHN S. HALLEY

Ass't. U. S. Attorney [80]

Service by copy of the above and foregoing Objections to Findings of Fact and Conclusions of Law proposed by Defendant is hereby admitted this 5th day of August, 1941.

(Sgd.) WM. M. KEARNEY

(Sgd.) DOUGLAS A. BUSEY

Attorneys for Defendant.

[Endorsed]: Filed Aug. 6th, 1941. [81]

[Title of District Court and Cause.]

MOTION FOR ADDITIONAL FINDINGS

Comes Now the defendant and moves this Honorable Court for the following additional findings of fact and conclusions of law:

FINDINGS OF FACT

1. That the portion of the purchase price, to-wit, the sum of \$1,853.92, paid by defendant to plaintiff is retained and kept by plaintiff. Plaintiff has not tendered said sum, or any part thereof, to defendant. Plaintiff has not offered in its complaint to refund said sum, or any part thereof. That defendants, and each of them, and the predecessors in interest of defendants, have acted entirely in good faith and without fraud or willful misconduct of any nature.

2. That on August 11, 1936, defendant, M. P. DePaoli, paid to the Register of United States Land Office at Carson City, the sum of \$5,116.62 as the last payment upon the purchase price [82] of the land sold to him by plaintiff. That said sum has been accepted and retained by plaintiff and has not been tendered to or returned to defendant.

CONCLUSIONS OF LAW

1. That defendants, and each of them, and the predecessors in interest of defendants, have acted in good faith and without fraud or willful misconduct of any nature.

2. That plaintiff has not tendered to defendant the portion of the purchase price, to-wit, the sum of \$1,853.92, paid by defendant to plaintiff and plaintiff is not entitled to a cancellation or rescission of the contract of sale of said lands.

Dated: August 7, 1941.

WM. KEARNEY

DOUGLAS A. BUSEY

[Endorsed]: Filed Aug. 8th, 1941. [83]

[Title of District Court and Cause.]

OBJECTIONS TO DEFENDANT'S MOTION
FOR ADDITIONAL FINDINGS FILED
AUGUST 8, 1941.

Comes Now the plaintiff in the above-entitled action and objects to defendant's motion for additional findings filed in the above-entitled Court and cause on August 8, 1941, and the conclusions of law therein proposed by said defendant, on the ground, and for the reason, that said findings of fact are contrary to the evidence adduced on the trial of the above-entitled cause, being *irrevelant*, redundant, and immaterial, and that said conclusions of law are contrary to law, and to such evidence, and respectfully moves that the following findings be stricken:

(a) That part of said additional finding No. 1 reading as follows:

“* * * That defendants, and each of them, and the predecessors in interest of defendants, [84] have acted entirely in good faith and without fraud or willful misconduct of any nature.”

(b) The whole of Paragraph No. 2 of such additional findings.

The plaintiff does hereby object to defendant's additional proposed conclusions of law on the ground, and for the reason that the same are contrary to law and to the evidence adduced on the trial of the above-entitled cause.

Respectfully submitted,

MILES N. PIKE,

United States Attorney

By JOHN S. HALLEY

Ass't. U. S. Attorney.

Service by copy of the above and foregoing Objections to Defendant's Motion for Additional Findings Filed August 8, 1941, is hereby admitted this 13th day of August, 1941.

WM. M. KEARNEY

DOUGLAS A. BUSEY

Attorneys for Defendant.

[Endorsed]: Filed Aug. 13th, 1941. [85]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

This action was filed by the United States in the above-entitled court on the 4th day of February, 1938, for the recovery of the possession of lands and premises described in the complaint as follows, to-wit:

NE $\frac{1}{4}$ of SW $\frac{1}{4}$, NW $\frac{1}{4}$ of SW $\frac{1}{4}$, SW $\frac{1}{4}$ of SW $\frac{1}{4}$, SE $\frac{1}{4}$ of SW $\frac{1}{4}$, S $\frac{1}{2}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$, S $\frac{1}{2}$ of SE $\frac{1}{4}$ of the NW $\frac{1}{4}$, Section 4 and Lot 17 of Section 9, all in Township 20 North, Range 24 East, M. D. B. & M., containing 236.14 acres.

1. That in the year 1861, the said lands were settled upon and occupied by the grantors and predecessors in interest of defendant, Garaventa Land & Livestock Company, a corporation, and ever since said date have been and still are occupied by defendant, Garaventa Land & Livestock Company, and its predecessors in interest.

2. That immediately after occupancy, the predecessors of said defendant improved said lands for farming purposes, and buildings, fences, and improvements were constructed thereon; that the Truckee River, a natural stream, is adjacent to the said lands and that artificial dams and ditches were constructed [86] to appropriate and divert water into ditches, by the predecessors in interest of the defendant, Garaventa Land & Livestock Company,

and the said lands were cleared and broken from their raw state and the same were planted to agricultural crops; that by means of the waters so diverted from said Truckee River through said artificial ditches crops were produced on said lands. That said crops were produced each and every year since about the year 1864; that at the time the said lands were settled upon, in the year 1861, the public surveys had not been extended to include said lands and the same were open and unsurveyed.

3. That in the year 1859, what thereafter has been known as the Comstock Lode was discovered on Mount Davidson in Western Utah Territory. This great mining discovery caused a large movement of white settlers to return from California and over the Overland Route from the East to where the discovery was made, which soon was given the name, Virginia City, and the region in the vicinity thereof which would include Pyramid Lake and the course of the Truckee River. As had been the case in the Westward movement of white settlers generally, such settlement and movement of the whites was met with the opposition of the native Indians, particularly, that of the Pa-Ute Tribe. In the same year 1859, Peter Lassen and two companions from Honey Lake Valley while engaged in prospecting a short distance northerly from Pyramid Lake were killed by Indians. News of such killing spread through the white settlements and was the occasion of organizations to oppose the Indians. In the hope of effecting peace between the Pa-Utes

and whites the Indian Agent assigned to Utah Territory with headquarters at Salt Lake City, on November 25, 1859, at Washington, D. C., addressed a letter to the Commissioner of Indian Affairs suggesting that reservations be made for the Indians of lands comprising "the Northwest part of the Valley of the Truckee River including Pyramid Lake, and the Northeast part of the Valley of Walker River including the Lake of the same." In the year 1860, two engagements occurred [87] between organizations of whites and the Indians, generally referred to as the First and Second Battles of Pyramid Lake. In the said First Battle the Indians defeated the white organization of which eight were killed including the acting officer in command known as Major Ormsby. In the Second Battle, shortly following, the Indians were defeated. On March 3, 1861, the Act of Congress creating the Territory of Nevada, was approved and thereafter Honorable James W. Nye was appointed Governor and Superintendent of Indian Affairs for the Territory. April 16, 1863, at San Francisco, General Wright in command of army forces for the Pacific Coast, addressed a letter to the Governor of the Territory of Nevada stating: "The Indian disturbances along the line of the overland mail route, east of Carson City, threaten the entire suspension of our mail facilities, as well as preventing any portion of the vast emigration approaching from the east reaching Nevada. * * * My force immediately available on that line is small. In the meantime it

is of such importance to keep the mail and emigrant route east of you open, that I would earnestly recommend that one or two companies of cavalry be promptly organized and prepared for muster into the service of the United States. It is impossible for us at this moment to purchase horses and equipments. Each man would have to furnish his own. * * *." On December 22, 1863, a second call for additional *troups* was made. On October 15, 1864, a third call for additional troops was made on Governor Nye by Major-General Irwin McDowell, commanding the Department of the Pacific, who, at that time was at Virginia City. As a result of these several calls the Territory supplied a regiment of cavalry and a battalion of infantry a total of 1180 men, all of whom were in service within the Territories of Nevada, Utah and Idaho occasioned by the Indian situation.

4. The legislature of Nevada of 1865 passed a joint resolution asking for a Federal military force to protect the Overland Trail and mail route from Nevada to the Missouri River [88] against hostile Indians.

In the Year 1866, the legislature of Nevada passed a joint memorial address to Major Halleck, commanding Department of Pacific, asking a suitable force of cavalry, etc., to repress the depredations of hostile Indians in Nevada, declaring there had been depredations "every year since the settlement of the territory." (Nev. Laws, 1866, page 267.)

That there is no treaty between the Piute Indians and the United States respecting Pyramid Lake Indian Reservation.

5. That the United States Public Land surveys were extended to subdivide said lands in the year 1866; that in the year 1869 the United States issued patents to lands adjacent and contiguous to the lands described in the complaint, to-wit:

Lands in Sections 4, 8 and 9, Township 20 North, Range 24 East, M. D. B. & M., and also in Sections 22 and 28 of Township 21 North, Range 24 East, M. D. B. & M., which are now embraced within the boundaries designated as the Pyramid Lake Indian Reservation.

The first improvements by the United States on Pyramid Lake Indian Reservation were begun many years after the defendant's predecessors had settled upon the said lands referred to in the complaint.

6. That the Town of Wadsworth, Washoe County, Nevada, is situated in part on Section 4 of Township 20 North, Range 24 East, M. D. B. & M., on lands to which the United States has issued patents; that from the year 1869, until the year 1904, the Southern Pacific Railroad Company maintained the railroad division point at said Town of Wadsworth in said Section 4, on lands to which United States patents had been issued.

7. By executive Order of March 23, 1874, the Pyramid Lake Indian Reservation was established;

that at the date of the establishment of said reservation and ever since the year 1861, the lands referred to in the complaint herein have been occupied and improved by predecessors in interest of defendants and the Piute Indians never have had possession of the same. [89]

That in the year 1865, the exterior boundaries of the Pyramid Lake Indian Reservation were established by survey, which survey included the lands referred to in the complaint. That on May 13, 1865, the Department of the Interior directed that the southerly boundary of the said reservation be moved to a point ten miles north of that previously fixed by said survey so as to place the lands referred to in the complaint and other lands settled upon by Whites outside the boundaries of the Pyramid Lake Indian Reservation. Subsequently, on August 17, 1865, said order was revoked. Neither the Piute Indians nor the United States have been in the actual possession of any of the lands referred to in the complaint; that no effort was made to remove the defendant's predecessors in interest or the defendant from said lands prior to the year 1909. In the year 1916, actions for ejectment were instituted in the United States District Court of the District of Nevada against the defendant herein and other settlers. That the Department of the Interior requested the Attorney General to postpone action on the pending suits against the said defendants until a further investigation could be made by the Department. That on June 7, 1924, the Congress of

the United States passed an act entitled "An Act for the Relief of Settlers and Townsite Occupants of certain lands in the Pyramid Lake Indian Reservation, Nevada, being Chapter 311, Public Laws of the United States of America (43 Stats. 596, Chap. 311); that pursuant to said act, defendant Garaventa Land & Livestock Company, a qualified applicant, made application to the Department of the Interior to purchase the lands described in the complaint, which application was approved; that the said lands described in the complaint are intermingled with patented lands owned in fee by the defendant, all of which form a single ranch unit and developed as a unit, and which was developed as a single ranch and irrigated through an individual ditch; that the dams, ditches and water rights used upon said lands are owned by the defendant, Garaventa Land & Livestock Company. [90]

8. That the land involved in the complaint herein is situated at the extreme southerly border of the Indian Reservation about twenty-five miles distant from Pyramid Lake and about twenty miles distant from the nearest portion of the reservation occupied by the Indians. That the Indians have restricted their occupation to the area known as the agency twenty miles to the north at or near Pyramid Lake.

9. Twelve settlers filed applications to purchase pursuant to the provisions of the act of June 7, 1924, (43 Stat. 596) and seven ultimately fulfilled all requirements and received patents.

The Secretary of the Interior in 1925 approved a classification and appraisal of the lands fixing prices ranging from \$3 an acre for nonirrigable land to \$75 an acre for irrigable land. He rejected an earlier classification and appraisal by a Mr. Trowbridge fixing prices ranging from \$3 to \$5 an acre for nonirrigable land to \$20 to \$30 an acre for irrigable land. March 3, 1925, the Secretary approved regulations directing that the settlers be allowed 90 days to file applications and pay the full appraisal price. May 1, 1925, he modified the regulations to allow the settlers to pay either the full appraisal price or one-fourth down and the balance in three equal annual instalments with interest on deferred payments at five per cent.

March 7, 1925, the defendant filed an application and made a quarter payment of \$1,853.92 on a full appraisal price of \$7,395.70. September 16, 1925, the General Land Office allowed the application. The defendant defaulted on the deferred payments, but, because of economic conditions and the pendency of proposed legislation to reduce the purchase price, the General Land Office refrained from cancelling its application. September 26, 1931, however, the General Land Office directed that the defendant be allowed 90 days from notice within which to pay the full deferred balance and interest. December 29, 1931, before the 90-day period expired, the General Land Office revoked the previous notice and [91] notified the defendant that it was allowed until

January 31, 1932, to pay one-third of the outstanding balance, and interest, and that, in case of default and in the absence of an appeal to the Secretary of the Interior, its application would be cancelled, all moneys paid forfeited and the case closed without further notice. Thereafter the General Land Office suspended action on the defendant's application pending consideration of S. Res. 142 which required the Department of the Interior to withhold collections from the settlers until a Senate Committee could investigate the situation as to the appraisals in effect.

May 24, 1935, the General Land Office advised the defendant that the appraisals in effect had been cancelled and the earlier Trowbridge appraisals adopted; that the purchase price for the land it was seeking to purchase was accordingly reduced from \$7,395.70 to \$4,005.70, thus leaving due and unpaid \$2,151.78 after credit given for the \$1,853.92 previously paid; that it was allowed 30 days to make full payment of principal and interest or to pay the interest only; and that the application would be cancelled without further notice if such payment was not made or an appeal taken to the Secretary.

The portion of the purchase price, to-wit, the sum of \$1,853.92, paid by defendant to plaintiff is retained and kept by plaintiff. Plaintiff has not tendered said sum, or any part thereof, to defendant. Plaintiff has not offered in its complaint to refund said sum, or any part thereof.

July 10, 1935, the defendant appealed to the Secretary for a further reduction of the appraisal price in the light of existing economic conditions. March 10, 1936, the General Land Office notified the defendant that the Secretary had ruled that all interest due on the unpaid principal was required to be paid within 30 days; that one-third of the principal due based on the 1934 re-appraisal was required to be paid within 6 months; and that, failing this, the application would be cancelled without further notice. The defendant failed to pay the interest as required and May 13, 1936, the Secretary ordered cancelled the application. [92]

10. The Federal Reclamation Act of June 17, 1902, as revised and amended in 1924, 43 Stat. 702, T. 43 U. S. C. A. Sec. 371 et seq., made provision for Federal aid in the reclamation of arid lands. The first Project established under this law, July 2, 1902, is known as the Truckee-Carson or Newlands Project. Following its establishment, two suits were instituted in this court by the United States as Plaintiff to determine prior existing water rights on both the Truckee and Carson Rivers. The Project was located near Fallon approximately thirty miles from the southerly end of Pyramid Lake Indian Reservation. In what is known as the Truckee River Suit, a temporary restraining order was entered February 13, 1926, making a preliminary determination of the then existing water appropriations theretofore made upon said River, designated Claim No. 1 etc. to No. 744. Claims Nos. 1

to 4, inclusive, relate to rights of the United States under the general designation "Government Rights," Claim No. 1, sub-headed: "Indian Ditch," deals with water rights "for the use and benefit of the Indians" on said Reservation to the extent of 3130 acres. Claim No. 2, subheaded "Indian Allotments," deals with water rights for such allotments when made. Claims Nos. 3 and 4 deal with the construction of a dam and canal and storage in Lake Tahoe for the Project in general. The said Restraining Order deals with the defendant herein and defendants in other similar pending actions, occupying lands within said Reservation, in the same manner as other land owners and water claimants without the limits of the Reservation.

That since the entry of said temporary restraining order, February 13, 1926, making preliminary determination of the then existing water appropriations theretofore made upon said river, the water has continuously been so distributed by a Water Master appointed by the Court, pending determination of rights resulting from additional storage on the headwaters of the Truckee River system within the State of California.

11. That in the year 1930, the defendant was heavily indebted and because of the nationwide financial depression, [93] beginning with the year 1930 and continuing for four or more years, the said defendant could not raise sufficient funds to complete said payments; that during all of said period, the defendant's lands and other assets were

heavily mortgaged and because of the depreciated values of livestock and farm products, the defendant could not raise additional funds to make said payments; that the said defendant carried on negotiations with the department for further extensions to enable it to obtain sufficient funds to pay said balance. That on or about May 13, 1936, the Department of the Interior gave notice to the said defendant that its right to purchase said lands was cancelled; that during said period up to date of said notice of cancellation, the said defendant was actively carrying on negotiations to raise said balance of the purchase price and shortly after said notice was received, the negotiations to raise said purchase price were successful and the said defendant offered to pay the said balance of the purchase price, together with interest in full, and the same was tendered to the Register of the United States Land Office but said officers refused to accept said payment and still and now refuse to accept the same. That the said defendant has at all times kept the said tender and payment good and still and now offers to pay said purchase money with interest in full.

12. That the sale price fixed by the Secretary of the Interior under the said Act of June 7, 1924, is far in excess of the ordinary sales prices of similar land on the public domain; that the initial payment made by the defendant on said purchase was in excess of the total amount which would be required if based on prices fixed by Congress for settlers on

the public domain. That areas of raw and undeveloped Government land adjacent to the lands described in the complaint have heretofore been disposed of by the Government at \$1.25 per acre to settlers under homestead and other public land acts. The defendant has already paid \$7.85 an acre for said land.

A memorandum addressed to the Secretary of the Interior by the Commissioner of Indian Affairs of date December 19, 1929, [94] and appearing in the printed report of hearings before the Committee on Indian Affairs, United States Senate in the year 1937 on Senate Bill 840, reads in part:

“The white settlers have only such legal rights as were extended to them by the Act of June 7, 1924, but their equities are unquestioned, and in view of all the facts and circumstances of this case, not one of them may be charged with bad faith, and this without regard to whether the reservation be considered as established by the Commissioner’s letter of 1859, the departmental withdrawal of 1861, or the Executive Order of the President in 1874. The Indians were not in possession when the white settlements were made, the boundary lines of the reservation were not clearly established, the Government offered no opposition to the settlers, and their claims were bought and sold much in the manner of privately owned lands. The new purchasers took possession, and no objection

appears to have been raised by the Government."

13. On March 10, 1936, the defendant received a letter from the Commissioner of the General Land Office, stating, among other things:

"A recomputation shows \$2,151.78 purchase money due and unpaid as of September 16, 1928, together with interest at 4% per annum from September 16, 1926, to date of payment which, if the principal is not paid until March 31, 1936, will amount to \$701.09."

CONCLUSIONS OF LAW.

1. The use of the words "terms" and "conditions," in Section 1 of the Act of Congress of June 7, 1924, 43 U. S. Stats. 596, T. 25, U. S. C. A., p. 344, clearly show that in order to effect an entry upon the occupied lands where, as in this case, the total price therefor is not required to be paid in full at one time but a part cash payment only is required and time or times allowed for subsequent cash payments with interest to accrue thereon, a prescribed cash payment on account of the total purchase price, made within the ninety days period, effects an entry within the clear meaning of the statute.

In this case, under the terms and conditions of the sale, an initial part payment only was required.

The partial payment in this case constituted entry within the meaning of the statute. [95]

Subsequent default or defaults in deferred payments do not of themselves present a condition requiring or authorizing the United States to enter upon the premises and take possession thereof. Such requirement exists only where entry is not made within the time specified. It is not the policy of the United States to seek forfeiture under circumstances such as are here presented.

2. That under the Sale Act of June 7, 1924, in view of said tender, plaintiff is not entitled to cancel the contract of sale of said lands entered into with the defendant, Garaventa Land & Livestock Company, and that it would be inequitable and unjust to require or permit the cancellation of such contract of sale or to disturb the defendant's possession of said lands.

3. That the plaintiff is not required to issue patent to said lands, except upon receipt and acceptance of the money tendered by the defendants as the balance of the purchase price of said lands, together with interest thereon.

That the plaintiff is not entitled to deprive defendant of the occupancy of said lands.

4. That the plaintiff, United States of America, is not entitled to judgment for the relief prayed for in said complaint and that the same should be dismissed.

Dated: August 22nd, 1941.

FRANK H. NORCROSS.

United States District Judge.

[Endorsed]: Filed Aug. 22nd, 1941. [96]

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO THE
COURT'S FINDINGS OF FACT AND CON-
CLUSIONS OF LAW.

Comes Now the plaintiff, United States of America, and hereby objects to the Court's findings of fact and conclusions of law made and filed in the above-entitled action on the 22nd day of August, 1941.

1. Objects to Paragraph No. 1 of said findings of fact on the ground and for the reason that the same is irrelevant, immaterial and redundant.

2. Objects to Paragraph No. 2 of said findings of fact on the ground and for the reason that the same is irrelevant, immaterial and redundant.

3. Objects to Paragraph No. 3 of said findings of fact on the ground and for the reason that the same is irrelevant, immaterial and redundant.

4. Objects to Paragraph No. 4 of said findings of fact [97] on the ground and for the reason that the same is irrelevant, immaterial and redundant.

5. Objects to Paragraph No. 5 of said findings of fact on the ground and for the reason that the same is irrelevant, immaterial and redundant.

6. Objects to Paragraph No. 6 of said findings of fact on the ground and for the reason that the same is irrelevant, immaterial and redundant.

7. Objects to Paragraph No. 7 of said findings of fact except that part of said finding reading as follows:

“By executive Order of March 23, 1874, the Pyramid Lake Indian Reservation was established;”

and except that part of Paragraph No. 7 of said findings of fact reading as follows: beginning on line one, page 5, with,—

“That in the year 1865,”

and ending with the words,—

“said order was revoked.”

and except that part of said findings of fact in Paragraph No. 7, beginning on line fourteen, page 5 thereof with the words,—

“In the year 1916,”

and ending with the words,—

“which application was approved;”.

8. Objects to Paragraph No. 8 of said findings of fact on the ground and for the reason that the same is irrelevant, immaterial and redundant.

9. Objects to Paragraph No. 10 of said findings of fact on the ground and for the reason that the same is irrelevant, immaterial and redundant.

10. Objects to Paragraph No. 11 of said findings of fact on the ground and for the reason that the same is irrelevant, [98] immaterial and redundant.

11. Objects to Paragraph No. 12 of said findings of fact on the ground and for the reason that the same is irrelevant, immaterial and redundant.

Plaintiff objects to the Court's conclusions of law, each, all and every paragraph thereof, on the

ground and for the reason that the same is contrary to the law, and to the evidence.

Dated: at Reno, Nevada, this 22nd day of August, 1941.

Respectfully submitted,

MILES N. PIKE,

United States Attorney,

By JOHN S. HALLEY,

Ass't. U. S. Attorney.

[Endorsed]: Filed Aug. 22, 1941. [99]

[Title of District Court and Cause.]

MINUTES OF COURT

of Friday, August 22, 1941.

At this time appears Miles N. Pike, Esq., U. S. Attorney, and John S. Halley, Esq., Assistant U. S. Attorney, attorneys for plaintiff; and D. A. Busey, Esq., of counsel for the defendants. The Court now files findings of fact and conclusions of law. Counsel for plaintiff file formal objections to the Court's findings of fact and conclusions of law. It is Ordered that plaintiff's objections to the Court's findings of fact and conclusions of law be, and the same hereby are, overruled. An exception to this ruling is granted counsel for the plaintiff. No objection to the Court's findings of fact and conclusions of law is made by Mr. Busey.

[100]

[Title of District Court and Cause.]

DESIGNATION OF THE CONTENTS
OF THE RECORD ON APPEAL

Now comes the United States of America, appellant in the above-entitled case, and designates for inclusion in the record on appeal the full and complete record and all proceedings and evidence in the action in this cause.

Respectfully submitted,
/s/ NORMAN M. LITTELL,
Assistant Attorney General.
/s/ MILES N. PIKE,
United States Attorney.

Service by copy of the above and foregoing is hereby admitted this 3rd day of September, 1941.

W. M. KEARNEY,
Attorney for Defendant.

[Endorsed]: Filed Sept. 4, 1941. [101]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Now comes the United States of America, appellant in the above-entitled case, and specifies the following statement of points to be relied upon on appeal:

1. The United States is entitled to recover the land within the Pyramid Lake Indian Reservation occupied by the defendant because title to the land

is in the United States and the defendant has acquired no rights under the Act of June 7, 1924, or the regulations issued pursuant thereto.

2. The Secretary of the Interior had authority to cancel the application of the defendant for its failure to complete the payments on the purchase price.

3. The defendant has no right to possession of the land in suit.

4. The court erred in entering judgment dismissing the complaint.

NORMAN M. LITTELL,

Assistant Attorney General.

/s/ MILES N. PIKE,

United States Attorney. [102]

Service by copy of the above and foregoing is hereby admitted this 3rd day of September, 1941.

W. M. KEARNEY,

Attorney for Defendant.

[Endorsed]: Filed Sept. 4, 1941. [103]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR TRANSMISSION
OF ORIGINAL EXHIBITS

Now comes the United States of America, plaintiff in the above-entitled action and states:

1. That there was introduced into evidence at the trial of this case an unusually large number

of exhibits consisting of many pages of typewritten and printed material, books, abstracts from books, and many maps;

2. That the plaintiff has taken an appeal from the judgment in this case and has designated for inclusion in the record on appeal the entire and complete record and all proceedings and evidence in the action;

3. That while it is necessary and desirable to have all the exhibits before the Circuit Court of Appeals, to require the Clerk of this Court to copy all of the exhibits introduced in this case would involve a tremendous burden on the Clerk and would serve no useful purpose; [104]

Wherefore the plaintiff moves this Court to order the Clerk to transmit to the Circuit Court of Appeals for the Ninth Circuit all of the original exhibits in this action.

Respectfully submitted,

/s/ NORMAN M. LITTELL,

Assistant Attorney General.

/s/ MILES N. PIKE,

United States Attorney.

[Endorsed]: Filed Sept. 4, 1941. [105]

[Title of District Court and Cause.]

ORDER AS TO ORIGINAL EXHIBITS

On motion of the United States of America, plaintiff in the above-entitled action, it is hereby ordered that the Clerk of this Court shall transmit to the Circuit Court of Appeals for the Ninth Circuit all of the original exhibits in this action, to be retained by the said Circuit Court of Appeals until disposition of the appeal in this action.

FRANK H. NORCROSS,

District Judge.

[Endorsed]: Filed Sept. 4, 1941. [106]

United States Circuit Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

GARAVENTA LAND AND LIVESTOCK CO.,
a Corporation, et al.,

Appellees.

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET CAUSE.

Upon consideration of the motion for enlargement of time to file transcript of record and docket cause, of the stipulation of counsel for appellee

thereto, and of the supporting affidavit of Miles N. Pike, United States Attorney, counsel for appellant, and good cause therefor appearing,

It is Ordered that the time to file transcript of record herein and docket the above cause in this court be, and hereby is extended to and including October 15, 1941.

CURTIS D. WILBUR,

Senior United States Circuit
Judge.

Dated: San Francisco, Calif, September 3, 1941.

[Endorsed]: Order, etc. Filed Sept. 3, 1941. Paul P. O'Brien, Clerk.

[Endorsed]: No. 2741. Filed Sept. 5th, 1941. O. E. Benham, Clerk U. S. Dist. Court, District of Nevada. [107]

[Title of District Court and Cause.]

ORDER AS TO ORIGINAL
TRANSCRIPT OF TESTIMONY.

On motion of the United States of America, plaintiff in the above-entitled action.

It is Hereby Ordered that the Clerk of this Court shall transmit to the Circuit Court of Appeals for the Ninth Circuit the original transcript of testimony taken at the proceedings had on the hearing of the above-entitled matter, to be retained by the said Circuit Court of Appeals for the Ninth

Circuit until disposition of the appeal in this action.

Dated this 16th day of September, 1941.

FRANK H. NORCROSS,

United States District Judge.

[Endorsed]: Filed Sept. 16, 1941. [108]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

U. S. DISTRICT COURT.

United States of America,

District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, -vs- Garaventa Land & Livestock Company, a corporation, et al., Defendants, said case being No. 2741 on the law docket of said Court.

I further certify that the attached transcript, consisting of 114 typewritten pages numbered from 1 to 114, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the "Designation of the Contents of the Record on Appeal"

filed in said case and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid. [109]

And I further certify that accompanying this record, in accordance with order of this Court filed and entered September 4, 1941, are all the original exhibits, both plaintiffs and defendants, filed in the aforesaid cause, with certain exceptions as hereinafter noted; said exhibits being listed as follows:

Plaintiff's Exhibits:

No. A—Photostat copy of letter dated March 3, 1925 from Commissioner of General Land Office to Register and Receiver, Carson City, Nevada.

No. B—Photostat copies of letters, etc.

No. C—Photostat copies of letters, etc.

No. D—Photostat copies of letters, etc.

No. E—Photostat copies of letters, etc.

No. F—Photostat copies of letters, etc.

No. G—Photostat copies of letters, etc.

No. H—Photostat copies of appeal and order on appeal filed with Dept. of Interior. (Garaventa Land and Livestock Co.)

No. I—Photostat copies of appeal and order on appeal. (J. A. Cerasola).

No. J—Photostat copies of appeal and order on appeal. (Domenico Cerasola).

No. K—Photostat copies of appeal and order on appeal. (M. P. Depaoli).

No. L—Photostat copies of appeal and order on appeal. (W. J. Cerasola).

No. M—Photostat copies of application of J. A. Cerasola to enter lands.

No. N—Photostat copies of application of Domenico Cerasola to enter lands.

No. O—Photostat copies of application of M. P. Depaoli to enter lands.

No. P—Photostat copies of application of Garaventa Land and Livestock Co. to purchase Land, etc.

No. Q—Photostat copies of application of W. J. Cerasola to enter lands. [110]

No. R—Photostat copies of letters, etc. and petition of M. P. Depaoli to reinstate application.

No. S—Copy of letter of May 13, 1936 to Register, Carson City, Nevada, from Commissioner of General Land Office in re Pyramid Lake entries.

No. T—Copies of several letters, etc. under one clip.

No. U—Copies of letters and return cards written by Alida C. Bowler.

No. V—Letter from Wm. Collier, Commissioner of Indian Affairs to Alida C. Bowler, dated May 20, 1936, and copy of letter from Commissioner of General Land Office to Register, Carson City, Nevada, dated May 13, 1936.

No. A-1, Photostat copy of Annual Report of the Commissioner of Indian Affairs for the year 1868, title page and pages 142 to 149, inclusive.

No. A-2, Photostat copies of letters and reports.

No. A-3, Photostat copies of letters.

No. A-4, Photostat copies of letters.

No. A-5, Photostat copies of letters.

No. A-6, Photostat copies of letters.

No. A-7, Photostat copies of letters.

No. A-8, Photostat copies of letters.

No. A-9, Photostat copies of letters.

No. A-10, Photostat copy of Map No. 944, Tube 926, Part of Pyramid Lake Reservation, Nevada.

No. A-11, Photostat copy of Map No. 915, Tube 45, covering area between Lake Tahoe and Pyramid Lake.

No. A-12, Photostat copy of Map No. 6788, Tube 780, covering Sections 5, 8, 9, 15, 16, 21, 22, 23, 27, 28, 32, 34 and 38 of Township 21 North, Range 24 East and Sections 3, 4, 5, 8, 9 and 10, Township 20 North, Range 24 East.

No. A-13, Photostat copy of Map No. 8528, Tube 1229, Pyramid Lake Indian Reservation, Nevada.

No. A-14, Photostat copy of Map No. 776 (No. 2), Tube 275, covering area in townships 20 to 29 North, inclusive, Mount Diablo Baseline, Ranges 20 to 25 East, Mount Diablo Meridian. [111]

No. A-15, History of Nevada by Davis, Volumes I and II.

No. A-16, Laws of Nevada Territory, 1862-1864, p. 196.

No. A-17, Statutes of Nevada for 1867, pages 183 and 184.

No. A-18, United States Statutes at Large, Vol. 45, part 2, Ch. 723, page 2378, Act of March 4,

1929 (This exhibit not sent for the reason that same is available in the appellate court.)

No. A-19, Volume 70, Part 2, Congressional Record, 70th Congress, Second Session, Senate Document No. 210, page 2278.

No. A-20, Photostat copy of Map of Utah Territory, etc., 1858.

No. A-21, Photostat copy of letter dated November 25, 1859, addressed to Hon. A. B. Greenwood, Commissioner of Indian Affairs from F. Dodge, Indian Agent of Nevada.

No. AA, Photostatic copy of the decision in the case of Central Pacific Railway Company reported in the 45th Volume, Land Decisions, pages 502, 503, 504, 505.

No. BB, Carbon copies of letters from the Commissioner of the General Land Office to the Surveyor General of California.

No. CC, Photostatic copy Report No. 175, dated January 4, 1859, by F. Dodge, Indian Agent.

No. DD, Photographic copy of Plat approved Sept. 25, 1865, T. 20 N., R. 24 E.

No. EE, Photographic copy of Plat approved Feb. 8, 1879.

No. FF, Photographic copy of Plat approved Jan. 19, 1888.

No. GG, Photographic copy of Plat approved Feb. 6, 1912.

No. HH, Photographic copy of Plat-B approved Dec. 31, 1913.

No. II, Photographic copy of Plat-A approved Dec. 31, 1913.

No. JJ, Photographic copy of Plat approved Nov. 1, 1935.

No. KK, Photographic copy of Plat approved Feb. 19, 1907, T. 21 N., R. 24 E.

No. LL, Photographic copy of Plat approved Feb. 25, 1908.

No. MM, Photographic copy of Plat approved Feb. 6, 1912.

No. NN, Photographic copy of Plat-B approved May 15, 1913.

No. OO, Photographic copy of Plat-A approved May 15, 1913. [112]

No. PP, Photographic copy of Plat approved Oct. 20, 1937.

No. QQ, Photographic copy of Map of Pyramid Lake Indian Reservation, Nev., surveyed in Jan. 1865.

No. RR, Photostatic copies of Senate Executive Documents, 36th Congress, 1st Sess. 1859-60, Vol. 1, No. 2, title page and pages 730 to 750 inclusive, of the report of the Secretary of the Interior.

No. SS, Photostatic copies of Senate Executive Documents, 36th Congress, 2nd Sess. 1860-61, Vol. 2, No. 1, title page and pages 68 to 106, inclusive, of the report of the Secretary of War.

No. TT, Photostatic copies Senate Executive Documents, 37th Congress, 2nd Sess. 1861-62, Vol. 1, No. 1, Pt. 1, title page and pages 616, 617, 618,

619 and 716 to 727 inclusive, of the report of the Secretary of Interior.

No. UU, Photostatic copies of the Report of the Commissioner of Indian Affairs for the year 1862, title page and pages 215 to 229, inclusive.

No. VV, Photostatic copies of Report of the Commissioner of Indian Affairs for the year 1863, title page and pages 390, 391, 392, 393, 416, 417, 418 and 419.

No. WW, Photostatic copies of Report of the Commissioner of Indian Affairs for the year 1864, title page and pages 138 to 151, inclusive.

No. XX, Photostatic copies of Report of the Commissioner of Indian Affairs for the year 1865, title page and pages 14 to 17, inclusive.

No. YY, Photostatic copies of the Report of the Commissioner of Indian Affairs for the year 1866, title page and pages 112 to 122, inclusive.

No. ZZ, Photostatic copies of Report on Indian Affairs by the Acting Commissioner for the year 1867, title page and pages 168 to 173, inclusive.

Defendants' Exhibits.

No. 1, Copy of letter to G. F. Allen, dated May 12, 1939.

No. 2, Registry Return Card.

No. 3, Printed pamphlet "Hearings before the Committee on Indian Affairs, etc." [113]

No. 4, Stipulation.

No. 5, Stipulation.

No. 6, Stipulation.

Nos. 7 to 19, inc. (Originals not sent. See "Offers of Additional Exhibits and Evidence", filed October 19, 1940, and made a part of the Transcript of Record on Appeal.)

Nos. I (a) to I (h) inclusive, Excerpts from the Report of the Commissioner of Indian Affairs for the year 1862 and the year 1866.

Plaintiff's Additional Exhibits

Photostatic copy of an Opinion of Assistant Attorney General George H. Shields, dated July 7, 1891. (This exhibit not numbered)

And I further certify that accompanying this record, and in accordance with order of this Court filed and entered September 16, 1941, is the original Transcript of Testimony filed in the aforesaid cause on June 30, 1939.

Witness my hand and the seal of said United States District Court this 13th day of October, 1941.

(Seal)

O. E. BENHAM,

Clerk, U. S. District Court.

[114]

[Title of District Court and Cause.]

TESTIMONY

Be It Remembered, That the above-entitled matters came on regularly for trial before the Court on Monday, the 19th day of June, 1939, at 10:00 o'clock A. M., Hon. F. H. Norcross, Judge, presiding.

Appearances

Wm. S. Boyle, Esq., U. S. District Attorney,
and

Thos. O. Craven, Esq., Asst. U. S. District
Attorney,
Attorneys for Plaintiff.

William M. Kearney, Esq.,
Attorney for Defendants Garaventa Land
& Livestock Company and Depaoli—Nos.
2741 and 2744.

Douglas A. Busey, Esq.,
Attorneys for Defendants Cerasola—Nos.
2742, 2743, and 2745.

The Court: We have five cases set for this morning.

Mr. Craven: Your Honor, we have set for trial what is [2*] commonly known as the Pyramid Lake land suits, and we move at this time that the five

*Page numbering appearing at bottom of page of original Reporter's Transcript.

suits be consolidated for the purpose of the trial. All of the suits involve identical issues.

Mr. Kearney: I have no objection, your Honor, to consolidating the cases insofar as the testimony of one relates to the other, but they involve different lands and there are some different issues.

The Court: They may be consolidated, subject to the right to introduce any additional evidence so far as any particular case is concerned. How will that do?

Mr. Kearney: Well, that amounts to the same thing. There are different issues in different cases and different lands, but insofar as the evidence in any one case is applicable to the other, I think it should be applied to all, but I do think on account of the fact there are different issues——

The Court: Oh yes, each case will have to be considered separately, with the exception that the evidence, so far as it applies to all cases, need not be repeated.

Mr. Busey: That is agreeable.

Mr. Craven: Your Honor, it has been stipulated between us that the court reporter's per diem shall be divided between the parties, the government bearing one-half and all the defendants one-half, to be apportioned between them as they see fit.

The Court: That will be the understanding.

Mr. Craven: I hand to your Honor a copy of the Act of June 7, 1924, upon which these actions are predicated. Your [3] Honor, these five actions,

Nos. 2741, 2742, 2743, 2744, and 2745, were commenced on February 2, 1939, to recover the possession of certain lands within the boundaries of the Pyramid Lake Indian Reservation, the complaint praying for all necessary writs for recovery of such possession. Various defendants were in possession of said lands and these actions were brought pursuant to the Act of Congress approved June 7, 1924, copy of which I have just handed to your Honor, the pertinent parts of which are as follows:

An Act for the Relief of Settlers and town-site occupants of certain lands in the Pyramid Lake Indian Reservation, Nevada.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to sell to the settlers or their transferees, under such terms, conditions, and price per acre as the said Secretary may prescribe, any lands in the Pyramid Lake Indian Reservation, in the State of Nevada, that have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act: Provided, That no more than six hundred and forty acres shall be sold to any one person or corporation: Provided further, That said sales shall be by private cash entry after it has been shown to the satisfaction of the Secretary of the Interior

that the lands applied for have been settled upon, occupied, and [4] improved as required by this Act, and in addition to such price per acre as may be fixed by the Secretary of the Interior all entrymen hereunder shall pay the same fees and commissions as provided by law where public lands are disposed of at \$1.25 per acre. The proceeds of said sales shall be deposited in the Treasury of the United States and be subject to appropriations by Congress for the Piute Indians of the said Pyramid Lake Indian Reservation.

That is Section 1 of the Act. Sections 2 and 3 are applicable to the townsite of Wadsworth and have no bearing upon the matter here. Section 4 provides:

“All sales in accordance with section 1 of this Act shall be made through the local land office within ninety days after the price of the land shall have been fixed by the Secretary of the Interior: Provided, That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation.”

The complaint in each action alleges: (1) That the plaintiff at all times herein mentioned, and ever since the year 1848, has been, and now is, the legal owner, and is now entitled to the possession of the

following described lands and premises, situate, lying and being in the County of Washoe, State and District of Nevada; (2) That on or about May 8, 1925, pursuant to that certain Act of Congress of June 7, 1924, entitled "An Act for the relief of settlers and town-site occupants of certain lands in the Pyramid Lake Indian Reservation, Nevada," being Chap. 311, [5] Public *Laes* of the United States of America, passed by the Sixty-Eighth Congress, and the regulations promulgated thereunder by the Department of the Interior, on March 3, 1925, as amended, the defendant made application to the Department of Interior to enter upon and to purchase the hereinbefore described lands; and pursuant to said Act and Regulations, such application was allowed, and said defendant did enter upon said lands and was required to and did agree to pay plaintiff for said lands, as the purchase price thereof, a certain sum, plus interest accruing after June, 1925, at the rate of four per cent per annum on all unpaid principal, such interest to be paid on or before April 7, 1936; (3) That each of the defendants has failed, refused and neglected to pay said purchase price, or any part thereof, or interest, except a certain specified sum, which sum was paid on or about June, 1925, and defendant has paid no further sum on said purchase price since said date; (4) That on or about May 13, 1936—11 years after the last payment had been made—the entries of each of the defendants upon said lands, and their right to purchase the same

was cancelled by the Department of the Interior, pursuant to the terms of said Act of June 7, 1924, and said Regulations, for failure to pay the agreed purchase price within the time allowed by law; and on March 7, 1936 each of the defendants was served by United States registered mail with written notice of such cancellation; (5) That on or about June 2, 1936, written notice was served on each of the defendants by Alida C. Bowler, Superintendent of Carson Indian Agency, Bureau of Indian Affairs, Department of Interior, demanding that the defendant vacate and yield up to plaintiff said lands on or before September 30, 1936. [6] That notwithstanding said demand to vacate and said cancellation of entry, defendants are still in possession and occupancy of said lands and wrongfully and unlawfully refuse to vacate the lands and yield same to plaintiff; (6) that in each of the complaints the defendants named and those whose true names are unknown, claim title and right of possession to the said property wrongfully, unlawfully and adversely to plaintiff.

In case No. 2741, United States of America vs. Garaventa Land & Livestock Company, certain allegations of the complaint are denied, which the government will prove, as follows: (1) the defendant denies that the plaintiff is entitled to possession of the lands described, but the defendant admits the legal ownership of the plaintiff to said land; (2) the defendant denies that the defendant agreed to pay the plaintiff the sum of \$4,005.70 plus interest

accruing after June, 1925, at the rate of 4 per cent per annum; (3) the defendant alleges extensions were granted within which to complete payment of the purchase price and interest; (4) the defendant denies that cancellation of entry of defendant and right to purchase the land was made on or about May 13, 1936; (6) the defendant admits that during the month of March, 1926, it received a letter by United States registered mail, containing a written notice purporting to cancel a contract of purchase entered into between defendant and plaintiff; (7) defendant denies that on or about June 2, 1936, written notice was served on it by Alida C. Bowler, Superintendant of Carson Indian Agency, demanding that it vacate and yield up to plaintiff said lands on or before September 30, 1936, but admits it is still in possession and occupancy of the lands described in the com- [7] plaint; (8) the defendant alleges that the Secretary of the Interior is without authority to cancel the contracts and that the contracts of purchase are still in full force and effect and that defendant is entitled to continued occupancy of the land.

In case No. 2742, *United States vs. J. A. Cerasola*, certain allegations of the complaint are denied, which the government will prove, as follows: (1) defendant denies that plaintiff is entitled to possession of the lands described in the complaint; (2) defendant denies that pursuant to the regulations promulgated by the Department of the Interior on March 3, 1925, under Act of Congress of

June 7, 1924, the purchase price of said lands was the sum of \$5,350.45, or any other sum except as hereinafter alleged, or that interest at the rate of 4% per annum, or at any other rate, was to accrue thereon after June, 1925, or at any other time, or that such interest was to be paid on or before April 7, 1936, or at any other date. The defendant alleges, however, that the lands were re-appraised and on November 30, 1934, the purchase price of said lands was fixed by the Department of the Interior in the sum of \$5,350.45—which is the same principal that we have alleged—with interest thereon at the rate of 4% per annum, which we submit is virtually an admission of the allegation of the complaint; (3) defendant denies that defendant has failed or refused or neglected to pay said purchase price, or any part thereof, or interest. Defendant alleges that defendant tendered the balance of said purchase price, together with all interest thereon, to plaintiff, in or about the month of June, 1936, which is after the cancellation of the entry. (4) Defendant denies that on or about May 13, 1936, the entry of defendant upon said lands and his right to purchase [8] the same was cancelled by the Department of the Interior; (5) defendant denies that on or about June 2, 1936, written notice was served on defendant by Alida C. Bowler, Superintendent of Carson Indian Agency; (6) defendant denies that he is in possession of the lands wrongfully and unlawfully.

Case No. 2743, United States vs. W. J. Cerasola

and Marjorie Cerasola, his wife, First Doe, Second Doe, Third Doe and Fourth Doe, in which W. J. Cerasola and Marjorie Cerasola have filed an answer. All of the other defendants are in default and their default has been duly and regularly entered. In behalf of the defendants in the case of W. J. Cerasola and Marjorie Cerasola, certain allegations of the plaintiff were denied, which the plaintiff will prove as follows: (1) The defendants, W. J. Cerasola and Marjorie Cerasola deny that the plaintiff is entitled to possession of the lands described in the complaint; they allege that since May 8, 1925, they have been the owners of said property and by themselves and their predecessors in interest have been in actual possession thereof for more than 75 years prior to the filing of the complaint; (2) they deny that the purchase price of the lands was \$5,037.70; they allege that the lands were reappraised and on November 30, 1934, the purchase price was fixed by the Department of the Interior in the sum of \$5,037.70, with interest thereon at the rate of 4% per annum; which we submit is virtually an admission of the allegation, (3) they deny that they have failed or refused or neglected to pay said purchase price or interest; they allege they tendered the balance of said purchase price, together with interest thereon, to plaintiff in or about the month of June, 1936; (4) the defendants W. J. Cerasola and Marjorie Cerasola admit receiving written notice of cancella- [9] tion; (5) they deny that on or about June 2, 1936, writ-

ten notice was served on them by Alida C. Bowler, Superintendent of Carson Indian Agency, demanding that they vacate and yield up to plaintiff said lands on or before September 30, 1936. In that action, your Honor, I wish to call your Honor's attention in that case, No. 2743, is against one Domenico Cerasola, the entryman for the land in question; in that case W. J. Cerasola and Majorie Cerasola have appeared and filed an answer. They deny that notwithstanding said demand to vacate and said cancellation of entry, defendants are still in possession and occupancy of said lands and wrongfully and unlawfully refuse to vacate said lands and yield same to plaintiff. They allege that defendant Marjorie Cerasola claims title and right of possession of said property adversely to plaintiff. Am I correct in stating, Mr. Boyle, the defendant, W. J. Cerasola, claims an interest in this land?

Mr. Boyle: You are speaking of——

Mr. Craven: No. 2743, Domenico——

Mr. Boyle: No, only the heirs of Domenico Cerasola.

Mr. Craven: And W. J. Cerasola is not one of his heirs?

Mr. Boyle: Is his heir, yes.

Mr. Craven: Then he claims an interest in the land?

Mr. Boyle: W. J. Cerasola does claim the land.

Mr. Craven: Then as I have stated, they allege the affirmative defense of estoppel.

In case No. 2744, United States vs. M. P. Depaoli and Lena Depaoli, his wife, certain allegations of the complaint are denied, which plaintiff will prove, as follows: (1) he denies that the plaintiff at all times since the year 1848 or at any time subsequent to June, 1925, and is now entitled to possession of the lands in question; (2) defendant M. P. Depaoli, denies he has failed or refused and neglected to pay the purchase price of the land in question, except he admits he has paid the sum of \$2,514.82, on or about June, 1925, and he denies that he has not paid any further sum on said purchase price since that date. That case is distinguishable from the others in that particular, your Honor. He admits paying part of the purchase price in the sum of \$2,514.82, which sum was paid on or before June, 1925, but he denies that the defendant Depaoli has paid no further sum of said purchase price. He denies that on or about May 13, 1936, entry of defendant upon the lands in question and his right to purchase the same was cancelled by the Department of the Interior, pursuant to the terms of the Act of June 7, 1924, for failure to pay the agreed purchase price; (4) he admits that on March 10, 1926, he received a letter by registered mail, containing written notice purporting to cancel the contract of purchase entered into between defendant Depaoli and the plaintiff; (5) he denies that on or about June 2, 1936, written notice was served on defendant Depaoli by Alida C. Bowler, Superintendent of Carson Indian Agency, demanding that

he vacate and yield up to plaintiff the lands in question before September 30, 1936; he admits he is still in possession and occupancy of the lands and has refused to vacate them; (6) he alleges an affirmative defense of estoppel. He also alleges that the defendant has paid to the United States said purchase price, together with interest thereon at the rate of 4%, in the aggregate sum of \$7,631.44, and that he is entitled to continued possession and legal title by the issuance of a patent [11] to him to the land. I might state at this junction, your Honor, I think it would be proper, the evidence will show that this defendant applied for a reinstatement of his entry after the cancellation thereof, which was denied. The balance of the purchase price at the time the reinstatement was applied for was sent to the Registrar, Land Office at Carson City, and reinstatement was denied and the money ordered returned by the Commissioner of the General Land Office on September 30, 1936.

In case No. 2745, United States vs. W. J. Cerasola and others, the appearance and answer is made by the defendants, W. J. Cerasola, Marjorie Cerasola, and J. A. Cerasola, apparently as heirs of Domenico Cerasola and Lena Cerasola, the wife of Domenico Cerasola. Certain allegations of the complaint are denied, which the plaintiff will prove, as follows: (1) the defendants deny that plaintiff is entitled to possession of the lands in question; they allege that since May 8, 1925, defendants have been the owners of said property and by themselves and

their predecessors in interest have been in actual possession for more than 75 years prior to filing of the complaint and are still in possession thereof; (2) they deny that the purchase price of the lands in question was the sum of \$5,956.38, or any other sum, except as alleged hereinafter, or that interest at the rate of 4% per annum, or any other rate was to accrue thereon after June, 1925, or at any other time, or that such interest was to be paid on or before April 10, 1936. They allege that after a reappraisment the purchase price of the lands in question was fixed by the Department of the Interior at \$5,956.38, the same principal as we allege, with interest thereon at the rate of 4% per annum, which [12] is virtually an admission, we submit, of the allegation of the complaint. (3) They deny that the defendant has failed to pay said purchase price or interest. They admit that the sum of \$2,386.16 was paid in June, 1925 and that no further sum has been paid on the purchase price since that date. They allege that the defendant tendered the balance of the purchase price, together with interest thereon, to plaintiff in the month of June, 1936; (4) they deny that on or about May 13, 1936, entry of Domenico Cerasola upon the lands in question and his, or his successors right to purchase same was cancelled by the Department of the Interior; they deny that on March 10, 1936, or at any other time, defendant Domenico Cerasola was served by registered mail with written notice of such cancellation. Incidentally, your Honor, that is the only

suit in which the service upon the defendant, or one of the defendants, of the notice of cancellation, was denied. (5) They deny that on or about June 2, 1936, written notice was served on Domenico Cerasola by Alida C. Bowler, Superintendent of Carson Indian Agency, demanding that Domenico Cerasola vacate the lands in question on or before September 30, 1936; they deny that Domenico Cerasola continued in possession and occupancy of the lands in question and wrongfully and unlawfully refused to vacate said lands; (6) They admit that Domenico Cerasola died in Washoe County, Nevada. I think it is proper at this time to state that the records of the State Health Office show that Mr. Cerasola died on March 3, on March 3, 1930, at Sparks, Nevada, which was prior to the notice by registered mail and prior to the notice by Alida C. Bowler. (7) They deny that Lena Cerasola was the wife of Domenico Cerasola during the time of the entry to and including the time of cancellation; they admit that she [13] died in Washoe County, Nevada; (8) They admit that the heirs of Domenico Cerasola and his wife are necessary and proper parties defendant and they admit that said heirs claim title and right of possession to the property in question, adversely to plaintiff. They admit that W. J. Cerasola and Marjorie Cerasola, his wife, claim title and right of possession to the lands in question, adversely to plaintiff and they allege that since May 8, 1925 they have been the owners of said property and by themselves and their predecessors

in interest have been in actual possession thereof for more than 75 years prior to the filing of the complaint, and are still in possession thereof. (9) They deny that defendant, J. A. Cerasola, without right or title, is in possession and occupancy of the lands in question and wrongfully and unlawfully withholds the possession thereof from plaintiff, but they admit he is in possession of the lands. They allege an affirmative defense of estoppel.

I think I have fully stated the allegations of the complaint and the denials, but if counsel has anything they wish to add, I will be glad to yield at this time.

Mr. Kearney: I have nothing.

Mr. Busey: I have nothing.

Mr. Craven: We offer in evidence, as Plaintiff's Exhibit A the Regulations of the Secretary of the Interior, promulgated March 3, 1935, pursuant to the Act of June 7, 1924.

PLAINTIFF'S EXHIBIT A

"B"

NC

United States
Department of the Interior
General Land Office
Washington

June 10, 1939.

I hereby certify that the annexed copy of letter dated March 3, 1925, filed under Miscellaneous No.

1169548, is a true and literal exemplification of the record on file in this office in my custody.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal)

ANTOINETTE FUNK

Assistant Commissioner of the
General Land Office.

Address Only the Commissioner of the
General Land Office
Department of the Interior
General Land Office
Washington

March 3, 1925.

In Reply Please Refer to
1169548 "K" MMJ
Register and Receiver,
Carson City, Nevada.

Gentlemen:

Sec. 1, act of Congress approved June 7, 1924,
Public #233, provides:

"That the Secretary of the Interior is hereby authorized to sell to settlers or their transferees, under such terms, conditions, and price per acre as the said Secretary may prescribe, any lands in the Pyramid Lake Indian Reservation, in the State of Nevada, that have been

settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act; Provided, That no more than six hundred and forty acres shall be sold to any one person or corporation; Provided further, That said sales shall be by private cash entry after it has been shown to the satisfaction of the Secretary of the Interior that the lands applied for have been settled upon, occupied, and improved as required by this Act, and in addition to such price per acre as may be fixed by the Secretary of the Interior all entrymen hereunder shall pay the same fees and commissions as provided by law where public lands are disposed of at \$1.25 per acre. The proceeds of said sales shall be deposited in the Treasury of the United States and be subject to appropriations by Congress for the Piute Indians of the said Pyramid Lake Indian Reservation.”

Sec. 4 of the said act directs:

“All sales in accordance with section 1 of this Act shall be made through the local land office within ninety days after the price of the land shall have been fixed by the Secretary of the Interior: Provided, That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute

Indians of the Pyramid Lake Indian Reservation.”

On February 7, 1925, the Assistant Secretary of the Interior approved the report of the examiners appointed to classify and appraise the lands, titles to which may be acquired under the said act, as modified by the Commissioner of Indian Affairs. The land has been classified as irrigated, improved irrigated and non-irrigable. The tracts in the different ranches and the prices at which they are to be sold are listed below.

Bonham Ranch claimed by Margaret Bonham Ross and her husband William Ross included lots 4, 5, 8, 9, 10 and 11, Sec. 12, T. 28 N., R. 19 E. Lot 5 has been eliminated, however, as it is needed to provide a passage for trailing sheep by stockmen leasing land on the reservation.

BONHAM RANCH

Township 28 North, Range 19 East, M. D. M.

Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Irrig.	Per Acre	Non- Irr.	Value	Per Acre	Value of Sub
12	Lot 4	39.57	4.50	3.00	13.50	35.07	3.00	105.21			118.71
	Lot 8	39.54	1.00	3.00	3.00	38.54	3.00	115.62			118.62
	Lot 9	39.48	1.50	3.00	4.50	37.98	3.00	113.94			118.44
	Lot 10	39.38				39.38	3.00	118.14			118.14
	Lot 11	39.44				39.44	3.00	118.32			118.32
		197.41	7.00		21.00	190.41		571.23			592.20

Flannigan Ranch, also known as the "Hard-
 scrabble Ranch," at present claimed by the Pyra-
 mid Land & Stock Company, Robert C. Turrutin,
 manager.

FLANNIGAN RANCH.

Township 24 North, Range 21 East, M. D. M.

Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Non- Irrig.	Per Acre	Value	Value of Sub.
20	Lot 4	44.68	2.00	50.00	100.00	42.68	3.00	128.04	228.04
	Lot 5	38.79	5.00	50.00	250.00	33.79	3.00	101.37	351.37
	NE $\frac{1}{4}$	40.00	29.00	50.00	1450.00	11.00	3.00	33.00	1483.00
	NW $\frac{1}{4}$	40.00	8.00	50.00	400.00	32.00	3.00	96.00	496.00
	SW $\frac{1}{4}$	40.00	1.00	50.00	50.00	39.00	3.00	117.00	167.00
	SE $\frac{1}{4}$	40.00	2.00	50.00	100.00	38.00	3.00	114.00	214.00
21	NE $\frac{1}{4}$	40.00	8.00	50.00	400.00	32.00	3.00	96.00	496.00
	NW $\frac{1}{4}$	40.00	12.00	50.00	600.00	28.00	3.00	84.00	684.00
	NW $\frac{1}{4}$	40.00	5.00	50.00	250.00	35.00	3.00	105.00	355.00
16	SE $\frac{1}{4}$	40.00	3.00	50.00	150.00	37.00	3.00	111.00	261.00
	SE $\frac{1}{4}$	40.00	6.00	50.00	300.00	34.00	3.00	102.00	402.00
	SW $\frac{1}{4}$	40.00	5.00	50.00	250.00	35.00	3.00	105.00	355.00
17	SW $\frac{1}{4}$	40.00	3.00	50.00	150.00	37.00	3.00	111.00	261.00
	SE $\frac{1}{4}$	40.00	4.00	50.00	200.00	36.00	3.00	108.00	308.00
		563.47	93.00		4650.00	470.47		1411.41	6061.41

The Mullen Ranch is claimed by John Poco of Reno, Nevada, by virtue of a sale by a referee in bankruptcy of the possessory interest of the Grizzly Livestock Company. The examination disclosed the following lands to contain indications of settlement, occupancy and improvement and their sale at the prices given was therefore recommended.

MULLEN RANCH

Township 23 North, Range 21 East, M. D. M.

Garaventa Land etc. Co.

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Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Irrig.	Per Acre	Value	Non-Irr.	Per Acre	Value	Value of Sub
1	NE $\frac{1}{4}$	40							40	3.00	120	120
	NW $\frac{1}{4}$	40							40	3.00	120	120
	SW $\frac{1}{4}$	40							40	3.00	120	120
	SE $\frac{1}{4}$	40							40	3.00	120	120
	NE $\frac{1}{4}$	40							40	3.00	120	120
	NW $\frac{1}{4}$	40							40	3.00	120	120
	SW $\frac{1}{4}$	40							40	3.00	120	120
	SE $\frac{1}{4}$	40							40	3.00	120	120
12	SE $\frac{1}{4}$	40	$\frac{1}{2}$	50	25.00	$\frac{1}{2}$	50	25.00	39	3.00	117	167
	NE $\frac{1}{4}$	40							40	3.00	120	120
	NW $\frac{1}{4}$	40							40	3.00	120	120
	SW $\frac{1}{4}$	40							40	3.00	120	120
	SE $\frac{1}{4}$	40							40	3.00	120	120
	NE $\frac{1}{4}$	40	3	50	150.00				37	3.00	111	261
	NW $\frac{1}{4}$	40							40	3.00	120	120
	SW $\frac{1}{4}$	40							40	3.00	120	120

Township 23 North, Range 22 East, M. D. M.

7	Lot 1											
	NW $\frac{1}{4}$	36.64	2	50	100.00	1	50	50.00	33.64	3.00	100.92	250.92
	Lot 2											
	SW $\frac{1}{4}$	36.73	5	50	250.00	2	50	100.00	29.73	3.00	89.19	439.19
		633.37	10.50		525.00	3.5		175.00	619.37	3.00	1858.11	2558.11

The Truckee River Ranches include "Garavanta", "Pierson," "Home," "Hoover," "Ceresola," "Sturla," "Hamilton," "Gardella," and "Hill" Ranches. The lands to be sold in each ranch and their classification and appraised value are listed below separately.

The Garavanta Ranch claimed by Garavanta Land & Livestock Company.

GARAVANTA RANCH.

Township 20 North, Range 24 East, M. D. M.

Sec. Sub.	Acres	Imp. Irr.	Per Acre	Value	Non. Irr.	Per Acre	Value	Value of Sub.
4 NE $\frac{1}{4}$ SW $\frac{1}{4}$	40.00	28.50	60.00	1710.00	11.50	5.00	57.50	1767.50
NW $\frac{1}{4}$ SW $\frac{1}{4}$	40.00	2.10	60.00	126.00	37.90	5.00	89.50	315.50
SW $\frac{1}{4}$ SW $\frac{1}{4}$	40.00	34.50	60.00	2070.00	5.50	5.00	27.50	2097.50
SE $\frac{1}{4}$ SW $\frac{1}{4}$	40.00	35.90	60.00	2154.00	4.10	5.00	20.50	2174.50
S $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$	20.00				20.00	5.00	100.00	100.00
S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$	20.00	8.40	60.00	504.00	11.60	5.00	58.00	562.00
8 NE $\frac{1}{4}$ NE $\frac{1}{4}$	40.00				40.00	5.00	200.00	200.00
Lot 11 SE $\frac{1}{4}$ NE $\frac{1}{4}$	44.52	.90	60.00	54.00	43.62	5.00	218.10	272.10
Lot 17 NW $\frac{1}{4}$ SW $\frac{1}{4}$	36.14	3.60	60.00	216.00	32.54	5.00	162.70	378.70
	320.66	113.90		6834.00	206.76		1033.80	7867.80

The Home Ranch claimed by William Caravanta. The S $\frac{1}{2}$ lot 15, Sec. 34 has been eliminated from the ranch for the reason that the inspector reported Indian and white cemeteries located on this subdivision.

HOME RANCH

Township 21 North, Range 24 East, M. D. M.

Garaventa Land etc. Co.

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Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Non- Irr.	Per Acre	Value	Value of Sub.
34	Lot 5								
	NE $\frac{1}{4}$ NW $\frac{1}{4}$	41.95	12.00	50.00	600.00	29.95	5.00	149.75	749.75
	Lot 6								
	NW $\frac{1}{4}$ NW $\frac{1}{4}$	41.35		50.00		41.35	5.00	206.75	206.75
	Lot 7								
	SW $\frac{1}{4}$ NW $\frac{1}{4}$	41.06		50.00		41.06	5.00	205.30	205.30
	Lot 8								
	SE $\frac{1}{4}$ NW $\frac{1}{4}$	41.04	10.50	50.00	525.00	30.54	5.00	152.70	677.70
E $\frac{1}{4}$	Lot 13								
	NE $\frac{1}{4}$ SW $\frac{1}{4}$	40.73	21.10	50.00	1055.00	19.63	5.00	98.15	1153.15
	Lot 14								
	NW $\frac{1}{4}$ SW $\frac{1}{4}$	40.62	6.50	50.00	325.00	34.12	5.00	170.60	495.60
	Lot 15, N $\frac{1}{2}$								
	SW $\frac{1}{4}$ SW $\frac{1}{4}$	20.14		50.00		20.14	5.00	100.70	100.70
	Lot 16								
	SE $\frac{1}{4}$ SW $\frac{1}{4}$	40.40	16.60	50.00	830.00	23.80	5.00	119.00	949.00
		307.29	66.70		3335.00	240.59		1202.95	4537.95

The Hoover Ranch claimed by William Ceresola.

HOOVER RANCH.

Township 21 North, Range 24 East, M. D. M.

Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Non- Irr.	Per Acre	Value	Value of Sub.
33	Lot 8								
	SE $\frac{1}{4}$	40.11	1.60	55.00	88.00	38.51	5.00	192.55	280.55
	Lot 7								
	SW $\frac{1}{4}$	40.48	2.20	55.00	121.00	38.28	5.00	191.40	312.40
	Lot 9								
	NE $\frac{1}{4}$	39.93	24.80	55.00	1364.00	15.13	5.00	75.65	1439.65
	Lot 10								
	NW $\frac{1}{4}$	40.23	12.60	55.00	693.00	27.63	5.00	138.15	831.15
		160.75	41.20		2266.00	119.55		597.75	2863.75

The Ceresola Ranch claimed by Domenico Ceresola.

CERESOLA RANCH.

Township 21 North, Range 24 East, M. D. M.

Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Non- Irr.	Per Acre	Value	Value of Sub.
22	Lot 12								
	SE $\frac{1}{4}$ SW $\frac{1}{4}$	41.88	20.10	55.00	1105.50	21.78	5.00	108.90	1214.40
	Lot 11								
27	SW $\frac{1}{4}$ SW $\frac{1}{4}$	41.59	3.30	55.00	181.50	38.29	5.00	191.45	372.95
	Lot 3—W $\frac{1}{2}$								
	NE $\frac{1}{4}$ NW $\frac{1}{4}$	20.87	4.20	55.00	231.00	16.67	5.00	83.35	314.35
	Lot 6—W $\frac{1}{2}$								
	SE $\frac{1}{4}$ NW $\frac{1}{4}$	20.335	7.60	55.00	418.00	12.735	5.00	63.67	481.67
	Lot 5								
	SW $\frac{1}{4}$ NW $\frac{1}{4}$	41.59	40.00	55.00	2200.00	1.59	5.00	7.95	2207.95
	Lot 12—W $\frac{1}{2}$								
	NW $\frac{1}{4}$ SW $\frac{1}{4}$	20.75	20.75	55.00	1136.25		5.00		1136.25

Sec. Sub.	Acres	Imp. Irr.	Per Acre	Value	Non. Irr.	Per Acre	Value	Value of Sub.
Lot 13—W ¹ / ₂ SW ¹ / ₄ SW ¹ / ₄	20.73	9.10	55.00	505.50	11.63	5.00	58.16	563.66
28 Lot 1 NE ¹ / ₄ NE ¹ / ₄	39.59	.40	55.00	22.00	39.19	5.00	195.95	217.95
Lot 7 SW ¹ / ₄ NE ¹ / ₄	39.78		55.00		39.78	5.00	198.90	198.90
Lot 8 NW ¹ / ₄ SE ¹ / ₄	39.43	4.30	55.00	236.50	35.13	5.00	175.65	412.15
Lot 13 SW ¹ / ₄ SE ¹ / ₄	39.47	4.20	55.00	231.00	35.27	5.00	176.35	407.35
27 Lot 4 NW ¹ / ₄ NW ¹ / ₄	41.56	17.50	55.00	962.50	24.06	5.00	120.30	1082.80
33 Lot 1 NE ¹ / ₄ NE ¹ / ₄	40.05	3.00	55.00	165.00	37.05	5.00	185.25	330.25
Lot 2 NW ¹ / ₄ NE ¹ / ₄	40.40	6.20	55.00	341.00	34.20	5.00	171.00	512.00
	488.025	140.65		7735.75	347.375		1736.88	9472.63

The Sturla Ranch claimed by M. P. Depaoli.

STURLA RANCH.

Township 21 North, Range 24 East, M. D. M.

Garaventa Land etc. Co.

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Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Non- Irr.	Per Acre	Value	Value of Sub.
22	Lot 7								
	SW $\frac{1}{4}$ NE $\frac{1}{4}$	41.18	0.70	55.00	38.50	40.48	5.00	202.40	240.90
27	Lot 1								
	NE $\frac{1}{4}$ NE $\frac{1}{4}$	41.88	9.50	55.00	522.50	32.38	5.00	161.90	684.40
	Lot 2								
	NW $\frac{1}{4}$ NE $\frac{1}{4}$	41.73	33.70	55.00	1853.50	8.03	5.00	40.15	1893.65
	Lot 7								
	SW $\frac{1}{4}$ NE $\frac{1}{4}$	41.68	25.20	55.00	1386.00	16.48	5.00	82.40	1468.40
	Lot 10								
	NW $\frac{1}{4}$ SE $\frac{1}{4}$	41.46	13.70	55.00	753.50	27.76	5.00	138.80	892.30
	Lot 11								
	NE $\frac{1}{4}$ SW $\frac{1}{4}$	41.54	17.10	55.00	940.50	24.44	5.00	122.20	1062.70

Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Non- Irrig.	Per Acre	Value	Value of Sub.
Lot 14									
	SE $\frac{1}{4}$ SW $\frac{1}{4}$	41.50	11.10	55.00	610.50	30.40	5.00	152.00	762.50
Lot 3—E $\frac{1}{2}$									
	NE $\frac{1}{4}$ NW $\frac{1}{4}$	20.82	14.40	55.00	792.00	6.42	5.00	32.10	824.10
Lot 6—E $\frac{1}{2}$									
	SE $\frac{1}{4}$ NW $\frac{1}{4}$	20.885	18.40	55.00	1012.00	2.485	5.00	12.42	1024.42
Lot 12—E $\frac{1}{2}$									
	NW $\frac{1}{4}$ SW $\frac{1}{4}$	20.75	3.55	55.00	195.25	17.20	5.00	86.00	281.25
Lot 13—E $\frac{1}{2}$									
	SW $\frac{1}{4}$ SW $\frac{1}{4}$	20.73		55.00		20.73	5.00	103.65	103.65
Lot 8									
22	SE $\frac{1}{4}$ NE $\frac{1}{4}$	41.20	12.30	55.00	676.50	28.90	5.00	144.50	821.00
		415.355	159.65		8780.75	255.705		1278.52	10059.27

The Hamilton Ranch claimed by Julius A. Ceresola.

HAMILTON RANCH.

Township 21 North, Range 24 East, M. D. M.

Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Non- Irr.	Per Acre	Value	Value of Sub.
15	Lot 6								
	SE $\frac{1}{4}$ NW $\frac{1}{4}$	41.44	17.50	50.00	875.00	23.94	5.00	119.70	994.70
	Lot 11								
	NE $\frac{1}{4}$ SW $\frac{1}{4}$	41.78	7.60	50.00	380.00	34.18	5.00	170.90	550.90
	Lot 10								
	NW $\frac{1}{4}$ SE $\frac{1}{4}$	41.54	5.30	50.00	265.00	36.24	5.00	181.20	446.20
	Lot 15								
	SW $\frac{1}{4}$ SE $\frac{1}{4}$	41.79	1.00	50.00	50.00	40.79	5.00	203.95	253.95
	Lot 7								
	SW $\frac{1}{4}$ NE $\frac{1}{4}$	41.90	1.00	50.00	50.00	40.90	5.00	204.50	254.50
		208.45	32.40		1620.00	176.05		880.25	2500.25

The Gardella Ranch claimed by Guiseppe Gardella.

GARDELLA RANCH.

Township 21 North, Range 24 East, M. D. M.

Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Non- Irr.	Per Acre	Value	Value of Sub.
Lot 12									
15	NW $\frac{1}{4}$ SW $\frac{1}{4}$	42.06	10.1	50.00	505.00	31.96	5.00	159.80	664.80
Lot 5—S $\frac{1}{2}$									
S $\frac{1}{2}$	SW $\frac{1}{4}$ NW $\frac{1}{4}$	20.87	2.5	50.00	130.00	18.27	5.00	91.35	221.35
Lot 5									
16	SW $\frac{1}{4}$ NE $\frac{1}{4}$	41.31	1.4	50.00	70.00	39.91	5.00	199.55	269.55
Lot 1									
	NE $\frac{1}{4}$ NW $\frac{1}{4}$	41.83	1.8	50.00	90.00	40.03	5.00	200.15	290.15
Lot 14—S $\frac{1}{2}$									
9	S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$	21.75	5.8	50.00	290.00	15.95	5.00	79.75	369.75
		167.82	21.70		1085.00	146.12		730.60	1815.60

The Hill Ranch claimed by Julius A. Ceresola.

HILL RANCH.

Township 21 North, Range 24 East, M. D. M.

Garaventa Land etc. Co.

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Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Non- Irr.	Per Acre	Value	Value of Sub.
Lot 1									
8	NE $\frac{1}{4}$	43.02	1.30	55.00	71.50	41.72	5.00	208.60	280.10
Lot 8									
	SE $\frac{1}{4}$	41.80	29.00	55.00	1595.00	12.80	5.00	64.00	1659.00
Lot 9									
	NE $\frac{1}{4}$	40.49	9.70	55.00	533.50	30.79	5.00	153.95	687.45
Lot 4									
9	NW $\frac{1}{4}$	43.18		55.00		43.18	5.00	215.90	215.90
Lot 5									
	SW $\frac{1}{4}$	43.25	4.40	55.00	242.00	38.85	5.00	194.25	436.25
Lot 12									
	NW $\frac{1}{4}$	43.35	18.50	55.00	1017.50	24.85	3.00	124.25	1141.75
Lot 13—N $\frac{1}{2}$									
N $\frac{1}{2}$	SW $\frac{1}{4}$	21.30	12.40	55.00	682.00	8.90	5.00	44.50	726.50
Lot 14—N $\frac{1}{2}$									
N $\frac{1}{2}$	SE $\frac{1}{4}$	21.75	5.00	55.00	275.00	16.75	5.00	83.75	358.75

The examiners in their report did not give the present claimant of the Pierson Ranch.

PIERSON RANCH

Township 20 North, Range 24 East, M. D. M.

Sec.	Sub.	Acres	Imp. Irr.	Per Acre	Value	Non Irr.	Per Acre	Value	Value of Sub.
9	Lot 12—N $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$	19.215	2.00	50.00	100.00	17.215	50.00	86.07	186.07

The lands will be sold subject to any right of way thereover previously granted.

The present claimants of the lands herein listed will be allowed 90 days from February 7, 1925, the date of the approval of the classification and appraisal, within which to pay the appraised price of the land at your office, together with the same fees and commissions as provided by law where public lands are disposed of at \$1.25 per acre. Prior to the allowance of an application for any tract, the applicant must file in your office his affidavit corroborated by the affidavits of two persons showing that the land which he seeks to purchase has been settled upon, occupied and improved by said settler or his transferor in good faith for a period of twenty-one years or more immediately preceding June 7, 1924. Immediately upon the receipt of an application to purchase, together with the required affidavit and the amount of the appraised price of the lands applied for, you will transmit the application and affidavit to this office and will hold the money in your unearned account until action is taken on the application.

You will advise the settlers on the lands listed of their rights under said act of June 7, 1924, and that if entry is not made within the time specified, the United States Government will take possession of the land for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation and all claims which they may have had thereto by rea-

son of settlement, occupancy and improvements thereon will be forfeited.

All moneys received from the sales herein authorized will be deposited in the Treasury of the United States and be subject to appropriation by Congress for the Piute Indians of the Pyramid Lake Indian Reservation.

Very respectfully,

WILLIAM [Illegible]

Commissioner.

Approved: March 3, 1925. (Signed) E. C. FINNEY, First Assistant Secretary.

2-21 hmk

[Endorsed]: No. 2741-2745, U. S. Dist. Court, District of Nevada. Plffs. Exhibit No. "A" for admission. Filed June 19, 1939. O. E. Benham, Clerk. By, Deputy.

Mr. Kearney: Of course, your Honor, please, may we reserve our right to object to this? The rules and regulations were never published, so far as I know, and not available to anybody except private individuals. We were unable to get any of them and [14] I doubt if it would be admissible because of its lack of publicity—a legal publication, and we do not know what is in it yet.

The Court: Let me make this suggestion. All documents that are governmental might go in, subject to any legal objection. It may be considered at the time of argument.

Mr. Kearney: Some may be admissible and others not, because we don't know—we haven't seen it yet. Some are not in accordance with the statute, some require publication, some do not.

Mr. Craven: I intended to make our offers for the purpose of the record and let counsel for defendants peruse them during recess. Anything that is convenient to your Honor.

The Court: That is satisfactory. Simply an offer made at this time.

Mr. Craven: We offer in evidence, as plaintiff's Exhibit B, in case No. 2741, United States against Garaventa Land & Livestock Company, photostatic certified copies of notice dated February 27, 1936, demanding payment of the purchase price and other notices prior thereto, demanding payment of purchase price, and evidence of service thereon upon the defendant.

PLAINTIFF'S EXHIBIT B

“B”

NC

United States
Department of the Interior
General Land Office
Washington

June 10, 1939.

I Hereby Certify that the annexed copies of papers and letters, filed under Carson City 015163, are true and literal exemplifications from the records on file in this office in my custody.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal)

ANTOINETTE FUNK,

Assistant Commissioner of the
General Land Office.

United States
Department of the Interior
General Land Office
Carson City, Nevada,
(Place)

April 14, 1936.
(Date)

Serial 015163

Replying to letter "K", dated February 27, 1936
Claimant: Garaventa Land & Livestock Co.,

PROOF OF SERVICE TRANSMITTED

The Commissioner of the General Land Office.

Sir:

Transmitted herewith is proof of service of the above-mentioned letter. The time allowed thereunder has expired.

Report is made that the party in interest has not made response thereto.

(If additional evidence, appeal or showing made,

so state and transmit papers; if registered letter returned unclaimed, transmit same herewith)
Registry return card herewith.

Very respectfully,

GLADYS E. HUYCK,

Register.

(Title)

[Receipt for Registered Article No. 4990 attached—addressed to U. S. Land Office—signed “Garaventa Land & Livestock Co., by T. J. Garaventa.”]

United States
Department of the Interior
General Land Office
Washington

Feb. 27, 1936.

In Reply Please Refer to
Carson City 015163 “K” JEW
Garaventa Land & Livestock Company,
Pyramid Lake Indian Reservation.

Payment required.

Register,
Carson City, Nevada.

Sir:

On July 15, 1935, claimant, Garaventa Land & Livestock Company, by their attorney, William M. Kearney, filed an appeal with the Secretary of the Interior, from office decision of April 12, 1935,

whereby it was held that claimant would be allowed 30 days within which to make payment in full of the unpaid purchase money, together with interest at four percent from September 16, 1925, the date of allowance of the entry, to December 31, 1934, or to make payment of the interest only. They were advised if they paid the interest, their entry would not be canceled for non-payment of principal, without giving them further opportunity to make the payment.

On November 25, 1935, the Secretary of the Interior modified said office decision in the following particulars:

(1) All interest due must be paid within 30 days from the date of service hereof;

(2) One-third of the unpaid principal now outstanding must be paid within six months from the date hereof;

(3) The unpaid principal will be computed on the basis of the 1934 reappraisal; and

(4) Interest will be computed by the General Land Office from the date of default.

A recomputation shows \$2,151.78 purchase money due and unpaid as of September 16, 1928, together with interest at four per cent from September 16, 1926, to date of payment which, if the principal is not paid until March 31, 1936, will amount to \$701.09.

You will allow claimant 30 days from the date of service hereof, within which to make payment of

\$701.09 interest due as of March 31, 1936, failing in which, the said entry, hereby held for cancellation, will be canceled and the case closed without further notice from this office.

In due time report, transmitting evidence of service of notice.

Very respectfully,
FRED W. JOHNSON,
Commissioner.

2-26-vgm

United States
Department of the Interior
General Land Office
Carson City, Nevada,
(Place)

July 16, 1935.
(Date)

Serial 015163

Replying to letter "K", dated
April 12, 1935

Claimant: Garaventa Land & Livestock Co.

PROOF OF SERVICE TRANSMITTED

The Commissioner of the General Land Office.

Sir:

Transmitted herewith is proof of service of the above-mentioned letter. The time allowed thereunder has expired.

Report is made that the party in interest has not made response thereto.

(If additional evidence, appeal or showing made, so state and transmit papers; if registered letter returned unclaimed, transmit same herewith)

Registry return card herewith.

Very respectfully,

ELIZABETH M. RYAN

Acting Register.

(Title)

[Receipt for Registered Article No. 3113 attached—Addressed to United States Land Office—signed “Frank L. Garaventa.”]

United States
Department of the Interior
General Land Office
Washington

Apr. 12, 1935.

In Reply Please Refer to
Carson City 015163 “K” LWB

Pyramid Lake Indian Reservation.

Purchase money due and unpaid, \$2151.78.

Interest due and unpaid to December 31, 1934,
\$799.73.

Register,

Carson City, Nevada.

Madam:

Under date of November 30, 1934, the Department concurred in a recommendation by this office

that the amount due under cash entry Carson City 015163 of Garaventa Land and Livestock Company for land in Pyramid Lake Indian Reservation be figured on the basis of the Trowbridge appraisal of \$4005.70 and that interest on the amount due be computed at the rate of 4% to December 31, 1934. The records of this office show \$1853.92 to have been paid on account of the principal and no interest to have been paid.

The said entry was made under the act of June 7, 1924 (43 Stat. 596) which authorizes the sale of the lands, "under such terms, conditions, and price per acre", as the Secretary of the Interior may prescribe.

Accordingly you will allow the Garaventa Land and Livestock Company 30 days from receipt of notice hereof within which to make payment in full of the unpaid purchase money, together with interest at 4% from September 16, 1925, the date of allowance of the entry, to December 31, 1934, or to make payment of the interest only. The interest required to December 31, 1934 is shown in the caption hereof.

If the interest only is paid, action looking to the cancellation of the entry because of nonpayment of the principal will not be taken without further notice to the claimant, giving him an opportunity to make the payment.

You will advise entryman that unless he makes payment of the unpaid purchase money and interest or makes payment of the interest only to De-

cember 31, 1934, or appeals herefrom to the Secretary of the Interior within the time allowed, his said entry hereby held for cancellation will be canceled, and the case closed, and the moneys heretofore paid forfeited without further notice from this office.

Very respectfully,
FRED W. JOHNSON,
Commissioner.

4-5-fmm

United States
Department of the Interior
General Land Office
Carson City, Nevada,
(Place)

Feb. 11, 1932
(Date)

Serial 015163
Replying to letter "K", dated
Dec. 16, 1931

Claimant: Garaventa Land & Livestock Co.

PROOF OF SERVICE TRANSMITTED.

The Commissioner of the General Land Office.

Sir:

Transmitted herewith is proof of service of the above-mentioned letter. The time allowed thereunder has expired.

Report is made that the party in interest has not made response thereto.

(If additional evidence, appeal or showing made, so state and transmit papers; if registered letter returned unclaimed, transmit same herewith.)

Registry return card herewith.

Very respectfully,

CLARA M. CRISLOR

Register.

(Title)

[Receipt for Registered Article No. 8288 attached
—Addressed to U. S. Land Office—Signed “Frank
L. Garaventa.”]

Carson City 015163 “K” MMJ

:Pyramid Lake Indian Lands.

:Payment required.

Register,

Carson City, Nevada.

Sir:

On September 26, 1931, you were directed to advise the Garaventa Land and Livestock Company that 90 days from receipt of notice would be allowed within which to pay the balance of the appraised price (\$5541.78) on purchase 015163, known as the Garaventa Ranch, within the Pyramid Lake Indian Reservation, together with interest to the date of payment. The records here do not show that claimant has made the payment required. The time al-

lowed has not expired but said decision is hereby revoked.

On November 11, 1931, the First Assistant Secretary approved the recommendation of the Commissioner of Indian Affairs that an extension of time be granted claimants under the act of June 7, 1924 (43 Stat. 596), for 30 days within which to permit them to pay one-third of the deferred payments, together with one-third of the accrued interest, the balance to be paid in two equal installments, with interest, in one and two years from the extension period.

You will advise the claimant in this case that the payments required on its purchase are as follows:

January 31, 1932 — \$2473.39

January 31, 1933 — 2597.06

January 31, 1934 — 2720.73

You will further advise claimant that if the first amount is not paid on or before January 31, 1932, or an appeal filed the purchase, which is hereby held for cancellation will be canceled, the money heretofore paid forfeited and the case closed without further notice from this office.

At the expiration of the time allowed submit report with evidence of service hereof.

Very respectfully,

FRED W. JOHNSON,

Commissioner.

Address Only the Commissioner of the
General Land Office

United States
Department of the Interior
General Land Office
Washington

Nov. 30, 1931.

In Reply Please Refer to
Carson City, 015159 "K" MMJ
015160-015161-015162-015163-
015164-015176-017362.

:Pyramid Lake Indian Lands.
:Request for instructions.

The Secretary
of the Interior.

Sir:

The act of June 7, 1924 (43 Stat. 596), authorized the Secretary of the Interior to sell to the settlers or their transferees under such terms, conditions, and price per acre as he might prescribe any land in the Pyramid Lake Indian Reservation that had been settled upon, occupied and improved by said settlers or their transferees in good faith for a period of 21 years or more immediately preceding the passage of the act.

Regulations under the above act were prepared in this office and approved by the First Assistant Secretary on March 3, 1925. The regulations allowed each claimant 90 days from the date of the approval of the classification and appraisement of the land

within which to pay the appraised price in the district land office. The regulations were modified by telegram approved by the Secretary on May 1, 1925, to allow the payment of one-fourth down and the balance in three equal annual installments with interest on the deferred payments at the rate of 5 per cent per annum.

On August 3, 1931, the First Assistant Secretary approved the recommendation of the Commissioner of Indian Affairs that the claimants in these cases be allowed 90 days within which to make complete payment. In this letter it was stated:

“Should any of the entrymen fail to make prompt payment of the balance of the principal and accrued interest as of date of final payment, steps should be taken by your Office to cancel the entries and permit the lands to revert to the status of incumbered reservation lands as provided by the act of 1924, *supra*.”

On August 11, 1931, this office wrote to the Department pointing out that it had never been the practice of this office to collect interest on purchases of ceded Indian lands except as authorized by the act or regulations making them subject to disposal; that in the opinion of this office there was no authority for collecting interest to the date of payment as proposed by the Indian Service, and that before taking steps looking to the cancellation of the entries in question it was requested that the Department instruct this office how many years interest should be required.

On September 14, 1931, the Assistant Secretary directed that interest should be computed in the following manner:

“Simple interest should be computed on each installment from date of entry to the due date of the respective installments, and the interest should then be added to each unpaid installment, thus forming a new principal which should bear simple interest to the date of actual payment.”

Accordingly, on September 22, 1931, and September 26, 1931, the Register was directed to allow each claimant on whose entry payment has not been made as required by the regulations and telegram above mentioned, 90 days from receipt of notice within which to pay the balance of the purchase price of his entry, together with interest to the date of payment computed as directed by the Assistant Secretary.

On November 9, 1931, the Commissioner of Indian Affairs transmitted to this office a copy of a letter from the Secretary in reply to a telegram from Senator Oddie, in which the Senator was advised that:

“It is believed that these settlers had ample time in which to complete their entries long prior to the period of depression through which the country is now passing, but in order to be fair with the settlers and just to the Indians it may be advisable to permit the settlers to pay

one-third of the deferred payments now on the land together with one-third of the accrued interest. We might then give these settlers two years more in which to complete the payment of principal and interest on the land, but unless full payments are made within the two-year period we can then reject their entries and close out their equities. Should this method be followed, it would be necessary for these people to be prompt in the remainder of their payments, and should they fail or neglect to meet any other deferred payment of principal and interest their entries will be rejected and closed."

The Commissioner's letter which was approved by the First Assistant Secretary on November 11, 1931, states in part:

"In conformity with the arrangement, it is suggested that an extension of time be granted these people for thirty days in which to permit them to pay one-third of the deferred payments together with one-third of the accrued interest, with the understanding that they are to pay one-third within one year and the balance within two years from the extension period."

The Register has already been directed to allow each of the claimants in question 90 days from receipt of notice within which to make payment of the principal with interest computed as directed by the Assistant Secretary on September 14, 1931. This period has not expired. Are the 30 days now to be

allowed to begin to run after the expiration of the 90-day period or concurrently with it?

It would seem that if the claimants are to be allowed further extensions of time within which to pay three deferred installments of the purchase price the proper amount to be required within 30 days would be the first deferred payment, together with interest on that amount computed as directed by the Assistant Secretary on September 14, 1931, to the date of payment; the second and third deferred payments with interest on each installment to the dates of payment to be paid in one and two years respectively. However, according to the suggestions of the Indian Service, approved by the First Assistant Secretary, the amount to be required in 30 days is the first deferred payment of the purchase price, together with one-third of the accrued interest on the three deferred payments, and the balance in one and two years from the extension period. In determining the interest to be collected at the end of the one and two-year extension periods since two-thirds of the interest past due was unpaid at the beginning of said periods, on what amount is it to be computed?

May I respectfully suggest that when a change of procedure is contemplated by the Indian Service in administrative practices within the jurisdiction of the General Land Office but pertaining to Indian matters such proposed changes be submitted by that Service to the Department through this office in order that an opportunity may be had to con-

sider the matter from the standpoint of this office having regard to the working out of the details of the proposed change.

Very respectfully,

Commissioner.

11-27-NBL

United States
Department of the Interior
General Land Office
Washington

Sep 26 1931

In Reply Please Refer To

Carson City 015163 "K" MMJ

: Pyramid Lake Indian Lands

: Payment required

Register,

Carson City, Nevada.

Sir:

On September 16, 1925, this office allowed application 015163 filed by the Garaventa Land and Livestock Company to purchase certain land known as the Garaventa Ranch within the Pyramid Lake Indian Reservation.

The application was filed under authority of the act of June 7, 1924 (43 Stat. 596), and departmental regulations of March 3, 1925. The total purchase price is \$7395.70.

The regulations require that a purchaser pay the appraised price within 90 days from the approval

of the classification and appraisement of the land but by telegram to you approved by the Department on May 1, 1925, the settlers were allowed either to pay all cash or one-fourth down and the balance in three equal annual installments with interest on the deferred payments at the rate of 5 per cent per annum.

From the record in this case it appears that the purchaser paid \$1853.92 as the initial payment, which is more than one-fourth of the purchase price. From the abstract it does not appear that you returned the excess payment.

On August 3, 1931, the First Assistant Secretary approved the recommendation of the Commissioner of Indian Affairs that each purchase under the act of June 7, 1924, *supra*, on which complete payment has not been made be canceled unless within 90 days from receipt of notice the purchaser pays the balance of the principal and accrued interest on his purchase as of the date of final payment.

On August 11, 1931, this office requested instructions from the Department as to how many years' interest should be required and on September 14, 1931, the Assistant Secretary directed that interest be computed in the following manner:

“Simple interest should be computed on each installment from date of entry to the due date of the respective installments, and the interest should then be added to each unpaid installment, thus forming a new principal which should bear simple interest to the date of actual payment.”

You will advise the purchaser that it is allowed 90 days from receipt of notice within which to pay \$5541.78 principal with interest to the date of payment computed as stated above or to appeal to the Secretary of the Interior failing in which the purchase, which is hereby held for cancellation will be finally canceled without further notice from this office.

At the expiration of the time allowed submit report with evidence of service hereof.

Very respectfully,

9-24-NBL

Commissioner.

United States
Department of the Interior
General Land Office
Washington

Aug 11 1931

015163

In Reply Please Refer To

Carson City 015159 "K" MMJ

015160-015161-105162-015163-

015164-015176-017362.

: Pyramid Lake Indian Lands.

: Request for instructions.

The Secretary
of the Interior.

Sir:

On March 3, 1925, the First Assistant Secretary approved regulations for the sale of lands to cer-

tain settlers on the Pyramid Lake Indian Reservation in Nevada as provided by the act of June 7, 1924 (43 Stat. 596).

The act provided that the sale should be by private cash entry. The regulations provided:

“The present claimants of the lands herein listed will be allowed 90 days from February 7, 1925, the date of approval of the classification and appraisement, within which to pay the appraised price of the land at your office, together with the same fees and commissions, as provided by law where public lands are disposed of at \$1.25 per acre.”

By telegram approved by the Secretary on May 1, 1925, the Register at Carson City, Nevada, was directed to allow the settlers either to pay all cash or one fourth down and the balance in three equal annual installments with interest on the deferred installments at the rate of 5 per cent per annum.

The question of reducing the price of these lands has been before the Department many times since the regulations for their disposal were promulgated. The last Congress adjourned without enacting S. 146 which proposed to reduce the price of the lands to \$2.50 an acre. On June 26, 1931, the Commissioner of Indian Affairs requested to be advised of the status of the entries made under said act of June 7, 1924, and on July 6, 1931, he was advised that there were 12 entries made under said act and that patents had issued on 4. On the other

8 entries only the initial payment has been made. He was also advised that since the adjournment of Congress without enacting the relief legislation this office had hesitated to cancel the entries in question in view of the equities of the claimants, the amounts involved and the present economic conditions, but that if in the interest of the Indians it was his wish that the entries be canceled steps to that end would be taken as soon as advice was received from him.

On August 3, 1931, the First Assistant Secretary approved the recommendation of the Commissioner of Indian Affairs that the claimants in these cases be allowed 90 days within which to make complete payment. In that letter it was stated:

“Should any of the entrymen fail to make prompt payment of the balance of the principal and accrued interest as of date of final payment, steps should be taken by your office to cancel the entries and permit the lands to revert to the status of unincumbered reservation lands as provided by the act of 1924, *supra*.”

It has always been held in this office that interest can only be collected on entries or purchases of ceded Indian lands as authorized by the act or regulations making them subject to disposal. By departmental approval of May 1, 1925, these entrymen were allowed to pay one-fourth of the purchase price on or before May 8, 1925, and the balance in three equal annual installments with the interest at

the rate of 5 per cent per annum on the deferred payments. Accordingly, there is no authorization for allowing extensions of time or collecting interest for more than three years. There was ample authority for canceling the entries at the expiration of the three years, but action was suspended pending proposed legislative action.

This office is of the opinion that there is no authority for collecting interest to the date of payment as proposed by the Indian Service and before taking steps looking to the cancellation of the entries in question it is requested that the Department instruct this office how many years' interest shall be required.

Very respectfully,
Acting Commissioner.

8-7-NBL

[Endorsed]: No. 2741. U. S. Dist. Court, District of Nevada. Plff's. Exhibit No. "B" for admission. Filed June 19, 1939. O. E. Benham, Clerk. By, Deputy.

We offer in evidence, as government's Exhibit C, in case No. 2742, United States vs. J. A. Cerasola, photostatic certified copies of notices dated February 27, 1936, from the General Land Office, demanding the payment of the purchase price from the defendant, of the amount due on entry, and

prior notices, extending time and demanding payment, and evidence of service thereof upon the defendant. [15]

We offer in evidence, as government's Exhibit D, in case No. 2743, United States vs. Dominico Cerasola, certified photostatic copies of first, a letter dated February 27, 1936, from the General Land Office, demanding payment of the amount due from the defendant under the entry within a specified time, and prior notices, demanding payment, and extensions of time and evidence of service thereof upon the defendant.

We offer in evidence as government's Exhibit E, in case No. 2744, United States vs. M. P. Depoali, certified photostatic copies of first, letter dated February 27, 1936, from the General Land Office, demanding payment of the money due from the entryman within a specified time, and other prior demands of payment and extensions of time and evidence of service thereof upon the defendant.

We offer in evidence, as government's Exhibit F, in case No. 2745, United States vs. W. J. Cerasola and Marjorie Cerasola, certified photostatic copies of a letter dated February 27, 1936, demanding payment of the amount due under the entry within a specified time, and prior demands for payments and extensions of time for payment and evidence of service thereof upon the defendants.

We offer in evidence as government's Exhibit G, in each of the cases, certified photostatic copies of cancellation of the entries 015159 "k" HHS, 015160,

015161, 015162, 015163. In other words, we offer as one exhibit individual photostatic copies of the cancellations of each of the entries in question.

PLAINTIFF'S EXHIBIT G

"B"

NC

United States
Department of the Interior
General Land Office
Washington

June 10, 1939.

I hereby certify that the annexed copy of letter dated May 13, 1936, filed under Carson City 015163, is a true and literal exemplification of the record on file in this office in my custody.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal)

ANTOINETTE FUNK.

Assistant Commissioner of the
General Land Office.

Address Only the Commissioner of the
General Land Office

United States
Department of the Interior
General Land Office
Washington

May 13, 1936.

In reply please refer to
Carson City 015159 "K" HHS
015160-015161-015162
05163-05164.

Pyramid Lake entries canceled.

Register,
Carson City, Nevada.

Sir:

By letters of February 27, you were instructed to allow the entrymen in the above enumerated entries 30 days from receipt of such letters within which to make payment of the interest due on their respective entries, covering lands within the Pyramid Lake Indian Reservation, in accordance with departmental decisions, A 19148, 19149, 19150, 19151, 19152 and 19153, all dated November 25, 1935.

You have submitted evidence of service of the said letters of February 27, by transmitting registry return receipts showing notices served March 7 on entrymen of entries 015159 and 015160, and notice served March 10 on the remaining four entrymen. You also reported that no action had been taken by the entrymen excepting Guisepppe Gardella, who

made payment of interest of \$237.27 which was the amount called for in entry 015164.

Therefore, since the entrymen holding entries 015159, 015160, 015161, 015162 and 015163 failed to pay the interest required, these entries are hereby canceled and the cases closed.

You will note your records as to the cancellation of the five entries and advise Mr. Gardella that since he has paid the interest called for he will be allowed until September 10, 1936, to make payment of the one-third purchase money due at that time.

Very respectfully,

FRED W. JOHNSON,
Commissioner.

Approved: May 13, 1936

(Sgd.) CHARLES WEST,
Secretary.

[Endorsed]: No. 2741. U. S. Dist. Court, District of Nevada. Plff's Exhibit No. G for admission. Filed June 19, 1939. O. E. Benham, Clerk. By _____, Deputy.

We offer in evidence as Exhibit H, in case No. 2741, United States vs. Garaventa Land & Livestock Company, certified photo- [16] static copies of an appeal from an order of the General Land Office to the Secretary of the Interior by the defendant, Garaventa Land & Livestock Company, and the decision on the appeal.

PLAINTIFF'S EXHIBIT H

“B”

NC

United States
Department of the Interior
General Land Office
Washington

June 10, 1939.

I hereby certify that the annexed copies of papers filed under Carson City 015163, are true and literal exemplification from the records on file in this office in my custody.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal)

ANTOINETTE FUNK

Assistant Commissioner of the
General Land Office.

Department of the Interior
Washington

“K”

Carson City 015163.

Requiring payment of unpaid
purchase money and/or interest.

Modified.

November 25, 1935.

A 19152

Garaventa Land and
Livestock Company

APPEAL FROM THE GENERAL LAND
OFFICE

The Garaventa Land and Livestock Company has appealed from a decision of the Commissioner of the General Land Office dated April 12, 1935, wherein its cash entry, Carson City 015163, was held for *cancellation* and wherein it was directed that it be advised that its entry would be finally canceled unless within thirty days from notice it should pay the unpaid purchase money amounting to \$2,151.78 with interest thereon at 4 percent from September 10, 1925, the date of entry to December 31, 1934, amounting to \$799.73, or make payment of the interest.

Appellant was advised if it paid the interest the entry would not be canceled for nonpayment of principal without giving further opportunity to make the payment.

The appeal in this case presents the same question upon a similar state of facts as that involved in the companion case of J. A. Cerasola, Carson City 015159, in which by decision of this date (A. 19148) the Commissioner's decision was modified. For the reasons stated in a departmental decision A. 19148, a copy of which is made a part hereof, the Commissioner's decision in the present case is modified in the following particulars:

(1) All interest due must be paid within 30 days from the date of service hereof;

(2) One third of the unpaid principal now outstanding must be paid within six months from the date hereof;

(3) The unpaid principal will be computed on the basis of the 1934 reappraisal; and

(4) Interest will be computed by the General Land Office from the date of default.

(Sgd)

T. A. WALTERS,

First Assistant Secretary.

109594

015163-7

United States
Department of the Interior
General Land Office
Washington, D. C.

IN THE MATTER OF LAND PURCHASE BY
GARAVENTA LAND and LIVESTOCK
COMPANY, a Corporation, UNITED
STATES LAND OFFICE CARSON CITY
SERIAL NO. 015163.

APPEAL FROM DECISION AND RULING OF
THE COMMISSIONER OF THE GENERAL
LAND OFFICE.

Comes now Garaventa Land and Livestock Company, a Corporation, and hereby appeals from the decision and ruling of the Commissioner of the General Land Office, which ruling requires the payment of certain principal and interest moneys on land within Pyramid Lake Indian Reservation figured on the basis of the Trowbridge appraisal, involving an entry made under the Act of June 7, 1924 (43 Stat., 596,) which authorizes the sale of the lands "under such terms, conditions and price per acre" as the Secretary of the Interior may prescribe.

This appeal is based upon the ground that since the appraisal by Mr. Trowbridge the value of the land has depreciated to such an extent that it is now out of all proportion to its earning power and market value and out of all proportion to its potential

value; also, upon the ground that the financial depression which began in the year 1929 has reduced the price of all agricultural products to such a point that the earning power of the land at the price fixed in the Trowbridge appraisal is out of proportion to the appraised earning power when the appraisal was made. The appellant also relies upon the fact that all of the lands and equities of appellant are mortgaged to such an extent that the land will not earn interest and taxes on the appraised price of the lands and that appellant's mortgage creditors are threatening foreclosure because of appellant's inability to meet taxes and interest from the products of said land; also, upon the ground that there has been no adequate market for farm products after 1929 down to the present time, during all of which time appellant has been operating said farm business at a loss.

Appellant further states that if the interest and principal as now fixed by the Trowbridge appraisal is required to be paid, it will mean a total loss of the investment which appellant has already placed in the said land.

Wherefore, appellant prays that the said ruling of the Commissioner requiring payment be suspended and that the Honorable Secretary of the Interior cause a re-appraisal to be made under present conditions to the end that a price for said lands may be fixed which will permit appellant to acquire the land and save the existing investment therein.

Dated: July 10, 1935.

W. M. KEARNEY

Attorney for Appellant.

[Endorsed]: No. 2741 U. S. Dist. Court, District of Nevada. Plff's. Exhibit No. "H" for admission. Filed June 19, 1939. O. E. Benham, Clerk. By....., Deputy.

We offer in evidence, as government's Exhibit I, in case No. 2742, United States vs. J. A. Cerasola, an appeal by the defendant, J. A. Cerasola, from an order of the General Land Office to the Secretary of the Interior and the decision by the Secretary of the Interior on the appeal.

We offer in evidence as government's Exhibit J, in case No. 2743, United States vs. Dominico Cerasola, an appeal by the defendant, Domenico Cerasola from an order of the General Land Office to the Secretary of the Interior and the decision of the Secretary of the Interior on that appeal.

Let the record show that in the event I have neglected to so state, that each and all of these records are certified photostatic copies from the General Land Office at Washington, D. C.

We offer in evidence, as Exhibit K, in case No. 2744, United States vs. M. P. Depoali, a certified photostatic copy of an appeal by the defendant, M. P. Depoali, from an order of the General Land Office to the Secretary of the Interior and the de-

cision of the Secretary of the Interior on that appeal.

We offer in evidence, as government's Exhibit L, in case No. 2745, United States vs. W. J. Cerasola and Marjorie Cerasola and others, a certified photostatic copy of the appeal by the defendant, W. J. Cerasola, from an order of the General Land Office to the Secretary of the Interior and the decision of the Secretary of the Interior on that appeal.

We offer in evidence as government's Exhibit M, a certified [17] ed photostatic copy of the application of J. A. Cerasola, dated May 8, 1925, to enter upon the land in question.

We offer in evidence as government's Exhibit N, a certified photostatic copy of the application of Domenico Cerasola, dated May 8, 1925, to enter upon and purchase the land in question. Previous exhibit M is an application to enter upon and purchase the land in question.

We offer in evidence, as government's Exhibit O, the application of M. P. Depaoli, dated May 8, 1925, to enter upon and purchase the land in question.

We offer in evidence a certified photostatic copy, as Exhibit P, of the application of Garaventa Land & Livestock Company, dated May 7, 1925, to enter upon and purchase the land in question.

PLAINTIFF'S EXHIBIT P.

1660896

“B”

United States Department of the Interior
General Land Office.
Washington

November 10, 1936.

I hereby certify that the annexed copy of application, filed under Carson City 015163, is a true and literal exemplification of the original on file in this office in my custody.

In Testimony Whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal) D. H. PARROTT,
Acting Assistant Commissioner of the General
Land Office.

1660896-7

Department of the Interior.
U. S. Land Office, Carson City, Nevada.

No. 015163.

Receipt No. 273888.

APPLICATION TO PURCHASE LAND
UNDER ACT OF JUNE 7, 1924.

Public No. 233.

The undersigned claimant under the provisions of an Act of Congress of the United States of

America, approved June 7, 1924, Public No. 233, hereby applies to purchase the following legal subdivisions of land pursuant to notice of March 3, 1925 under the appraisal of Secretary of the Interior, by reference No. 1,168,548 "K" MMJ, and pursuant to additional notice of May 1, 1925 of Local Land Office, Carson City, Nevada.

Township Twenty (20) North, Range Twenty-four (24) East, M. D. B. & M.:

In Section Four (4) Northeast Quarter of Southwest Quarter ($NE\frac{1}{4}SW\frac{1}{4}$)—40 acres; Northwest Quarter of Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$)—40 acres; Southwest Quarter of Southwest Quarter ($SW\frac{1}{4}SW\frac{1}{4}$)—40 acres; Southeast Quarter of Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$)—40 acres; South Half of Southwest Quarter of Northwest Quarter ($S\frac{1}{2}SW\frac{1}{4}NW\frac{1}{4}$)—20 acres; South Half of Southeast Quarter of Northwest Quarter ($S\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$)—20 acres;

In Section Nine (9) Lot Seventeen (17) or Northwest Quarter of Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$)—36.14 acres.

The prices to be paid for the said land are governed by the notice of March 3, 1925 and local Land Office notice dated May 1, 1925 under the same heading, or in the event any changes are made in the ruling of March 3, 1925 reducing the prices to be paid for the said land or the terms of payment the undersigned desires and requests the benefit thereof.

Dated: May 7, 1925.

GARAVENTA LAND &
LIVESTOCK CO.

By FRANK L. GARAVENTA.
Vice-President.

United States Land Office at Carson City,
Nevada.

I Hereby Certify that the aforesaid lands as
applied for above are subject to entry by the above
named applicant at the price specified in notice of
March 3, 1925, No. 1,169,548 "K" MMJ.

CLARA M. CRISLOR,
Register.

Above described land not classified properly ap-
plicants reserve the right to file supplementing
maps and classification.

Price of land protected and fee paid under
protest.

GARAVENTA LAND &
LIVESTOCK CO.

By FRANK N. GARAVENTA.

Posted May 19, 1925. F. H. C.

Loose Leaf Vol 110.

Department of the Interior.

U. S. Land Office, Carson City, Nevada.

Under Application to Purchase Land

Under Act of June 7, 1924.

Public No. 233.

Frank L. Garaventa, being first duly sworn, deposes and says: That he is the Vice-President of Garaventa Land & Livestock Company, a corporation organized and existing under and by virtue of the laws of Nevada, and as such Vice-President makes this affidavit for and on behalf of said corporation, occupant and claimant of and for certain lands designated in the application to purchase, attached hereto, under the Act of June 7, 1924, Public No. 233; that the said lands have been settled upon, occupied and improved by the predecessor of claimant in good faith for a period of more than twenty-one years immediately preceding June 7, 1924; that to affiant's personal knowledge the lands described in said application were occupied, settled upon and improved prior to the year 1895, and according to information and belief affiant states that the said lands were occupied, improved and settled upon as early as the year 1865 or prior thereto; that continuously since the year 1895, and according to information and belief, continuously since prior to 1865 and long prior to the proclamation of 1874 fixing the boundary lines of the Pyramid Lake Indian Reservation, the said lands were actually settled upon, occupied and improved by the predecessors in interest of claimant, all in good

faith and with the intention of obtaining title under the laws applicable thereto; that affiant is a citizen of the United States and over the age of twenty-one years. Further affiant saith not.

FRANK L. GARAVENTA.

Subscribed and sworn to before me this 7th day of May, A. D. 1925.

(Seal) GEORGIA NEWMAN,

Notary Public in and for the County of Washoe,
State of Nevada.

CORROBORATIVE AFFIDAVITS.

M. P. Depaoli being first duly sworn, deposes and says: That he has read the affidavit of Frank L. Garaventa attached hereto and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated on information and belief and as to those matters he believes it to be true; that affiant has personal knowledge of the lands referred to in the application attached hereto and upon his oath states that the said lands have been settled upon, occupied and improved by the claimant Garaventa Land & Livestock Co. and its predecessor in interest in good faith for a period of more than twenty-one years immediately preceding June 7, 1924 that affiant is a citizen of the United States and over the age of twenty-one years.

M. P. DEPAOLI

Subscribed and sworn to before me this 7th day of May, A. D. 1925.

GEORGIA NEWMAN.

Notary Public in and for the County of Washoe,
State of Nevada.

W. J. Ceresola being first duly sworn, deposes and says: That he has read the affidavit of Frank L. Garaventa attached hereto and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated on information and belief and as to those matters he believes it to be true; that affiant has personal knowledge of the lands referred to in the application attached hereto and upon his oath states that the said lands have been settled upon, occupied and improved by the claimant Garaventa Land & Livestock Co. and its predecessor in interest in good faith for a period of more than twenty-one years immediately *predecing* June 7, 1924; that affiant is a citizen of the United States and over the age of twenty-one years.

W. J. CERESOLA.

Subscribed and sworn to before me this 7th day of May, A. D. 1925.

GEORGIA NEWMAN,

Notary Public in and for the County of Washoe,
State of Nevada.

[Endorsed]: No. 2741. U. S. Dist. Court, District of Nevada. Plaintiff's Exhibit No. "P" for admission. Filed June 19, 1939. O. E. Benham, Clerk.

We offer in evidence, as government's Exhibit Q, certified photostatic copy of the application of W. J. Cerasola, dated May 8, 1925, to enter upon and purchase the land in question.

We offer in evidence as government's Exhibit R, in case No. 2744, United States vs. M. P. Depaoli, a certified photostatic copy of a petition by M. P. Depaoli, to reinstate his contract of purchase, dated August 11, 1936; the denial of the petition for reinstatement, with order for money deposited for reinstatement, dated September 30, 1936; cancellation of the entry of the defendant, M. P. Depaoli and demand for payment of the purchase price and appeal from the General Land Office to the Secretary of the Interior, and order on appeal and prior extensions of time.

The Court: We will take a recess until 11:00 o'clock and [18] you can let the Court know in the meantime if you need further time.

Mr. Craven: Exhibit M, application of J. A. Cerasola, case No. 2742; Exhibit N, application of Domenico Cerasola, case No. 2745; Exhibit O, application of M. P. Depaoli, case No. 2744; Exhibit P, application of Garaventa Land & Livestock Company, case No. 2741; Exhibit Q, application of W. J. Cerasola, case No. 2743.

(Recess taken at 10:45.)

11:04 A. M.

Mr. Kearney: I would state, your Honor, we have not had opportunity to read but a very small

portion of the exhibits. We are still not ready to present the formal objection that we desire to make to the offer.

The Court: That can be taken later.

MRS. HUYCK,

a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Craven.

Q. State your name please.

A. Gladys E. Huyck.

Q. Are you employed by the United States Government, Mrs. Huyck? A. Yes, I am.

Q. In what capacity?

A. United States Land Register.

Q. For——

A. District Land Office in and for the District of Nevada.

Q. That covers all the State of Nevada?

A. Yes sir. [19]

Q. How long have you been in that position?

A. Since October 9, 1935.

Q. And as Register you are official custodian of all records and files of the Land Office?

A. Yes sir.

Q. Your offices are in this building in Carson City are they not? A. Yes sir.

Q. Mrs. Huyck, do you have the various land entries in this State designated by number?

A. Yes sir, we do.

(Testimony of Mrs. Huyek.)

Q. Could you tell the Court the name of the entryman, as shown by your records, in case No. 015159 "K"?

Mr. Kearney: I think on those matters the file could be admitted; as far as I am concerned, the names of entrymen that occur in your pleadings are correct? Am I right, Mr. Busey?

Mr. Busey: Yes, there is no objection.

Mr. Craven: I will just state—may the record show that land entry in the Carson Land Office, No. 015159 "K" HHS, 015160, 015161, 015162, and 015163—I think we had better straighten these numbers out and give the proper numbers.

Q. Will you tell us the names of the respective entrymen for those numbers?

A. No. 015159 is J. A. Cerasola; 015160 is W. J. Cerasola; 015161 is Dominico Cerasola; 015162 is M. P. Depaoli; 015163 the Garaventa Land & Livestock Company.

Q. Did you receive a cancellation of each of these entries from the Commissioner of the General Land Office, dated May 13, 1936?

Mr. Kearney: We object on the ground the Commissioner of [20] the General Land Office had no authority, under the Act of 1924, to cancel those entries and that question calls for conclusion; that if a writ of cancellation was made, it speaks for itself and the document legally made by an officer empowered by Congress to make it; therefore, we

(Testimony of Mrs. Huyck.)

object to that particular question upon the ground it calls for conclusion and is incompetent.

The Court: I think the question is preliminary and then the documents may be admitted. Objection for the present will be overruled.

(Question read)

A. I did.

Mr. Kearney: May we take an exception?

The Court: Yes, that may be understood. The documents themselves will control.

Q. Were each of those cancellations in each of the cases approved by the Secretary of the Interior or by the Assistant Secretary of the Interior?

Mr. Kearney: We make that same objection upon the ground——

The Court: I think the objection now is good. If you have the documents——

Mr. Craven: They are in evidence already, your Honor. This is just preliminary.

The Court: I will permit it, subject to the objection.

A. A notice of cancellation was approved and signed by Charles West, Acting Secretary.

Mr. Kearney: I move that the answer be stricken upon the ground that it is conclusion of the witness, because the document and his signature are the best evidence; no foundation laid. [21]

The Court: I understand from counsel those documents are already in evidence.

(Testimony of Mrs. Huyek.)

Mr. Kearney: A lot of those documents offered in evidence are not in evidence yet and are unsigned, a lot of them; self-serving declarations. There are numerous objections we want to file. All the correspondence is not available, therefore, any statement by this witness as to who signed a particular document wouldn't be binding and would be a conclusion, without any foundation having been laid.

The Court: The witness seems to have a paper. You might make some inquiries as to what document that is.

Q. You have that document in your possession?

A. The original letter of cancellation.

Q. This is the original letter of cancellation?

A. Yes sir.

Mr. Craven: We offer this in evidence.

Mr. Kearney: If the Court please, we object to this document, upon the ground, first, there is no foundation laid for its admission; second, upon the further ground that the Commissioner of the General Land Office has no authority or power to cancel or attempt to cancel the particular entries referred to in the document, in that the Act of 1924 did not provide for any cancellation of the entries, except on failure to make the original application to purchase, and there is no rule or regulation promulgated by virtue of the authority of Congress, nor is there any rule or order published by virtue of the Act of Congress which would give the power purported to be contained in this letter from the Com-

(Testimony of Mrs. Huyck.)

missioner of the General Land Office, [22] authorizing said Commissioner or the Secretary of the Interior to cancel these entries in the manner and form in which they attempted to do so.

The Court: For the present the objection will be overruled. It may be admitted subject to the objection. We will take up the legal effect of all of these documents later.

Mr. Kearney: May we have an exception?

Mr. Busey: May it show I make the same objection to the introduction of the letter?

The Court: Yes, it will go to all the cases.

Clerk: Plaintiff's Exhibit S.

The Court: If these official documents now offered are required to be kept in the Land Office, we might consider whether they couldn't be read into the record.

Mr. Craven: I will read this into the record now, your Honor: "The Commissioner of the General Land Office, 7 x R United States Department of the Interior, General Land Office, Washington, May 13, 1936. Received U. S. Land Office May 18, 1936, Carson City, Nevada. In reply please refer to Carson City 015159 "K" HHS — 015160 — 015161 — 015162 — 0151613 — 015164." In red pencil: "9/10/36". The figure 015164 is in red pencil marked with a circle around it——

Mr. Kearney: I suggest that the reporter copy it, it will save time; unless the Court desires to hear it.

(Testimony of Mrs. Huyek.)

The Court: It won't take long, it is short. You might read this one and the others have copied for [23] the record by the reporter.

Mr. Craven: The figures 015164 and the figures in red pencil 9-10-36, have red pencil mark enclosing all of them. In black pencil: "Note, regular mail—5 copies, 1 each A P P E M Pyramid Lake entries cancelled. Register, Carson City, Nevada. Sir: By letters of February 27, you were instructed to allow the entrymen in the above-enumeraged entries, 30 days from receipt of such letters, within which to make payment of the interest due on their respective entries covering lands within the Pyramid Lake Indian Reservation, in accordance with Departmental decisions A-19148, 19149, 19150, 19151, 19152, and 19153, all dated November 25, 1935. You have submitted evidence of service of said letters of February 27, by transmitting registry return receipts, showing notice served on March 7 on entry of entrymen 015159 and 015160 and notice served March 10th on the remaining four entrymen. You also reported no action had been taken by entrymen, excepting Guiseppe Gardella, who made payment of interest of \$237.27, which was the amount called for in entry 015164. Therefore, since the entrymen holding entries 015159, 015160, 015161, 015162, and 015163 failed to pay the interest required, those entries are hereby cancelled and the cases closed. You will note your records as to cancellation of the five entries and advise Mr.

(Testimony of Mrs. Huyck.)

Gardella that since he has paid interest called for, he will be allowed until September 6, 1936 to make payment of one-third of the purchase money due at this time. Very respectfully Fred W. Johnson, Commissioner. Approved May 13, 1936. Charles West, Acting Secretary." At the bottom of the page are the figures "2" and then "52-GB". At the top of the page: "Carson City, [24] 015159 ETC "K" HHS."

Q. Mrs. Huyck, did you send a copy of that letter from the Commissioner, which was approved by the Acting Secretary and which cancelled each of the entries in question, to each of the entrymen?

A. Yes, we did.

Q. Do you have a record of the mailing of those notices?

A. We have a record on our records they were mailed by regular mail, not registered mail.

Q. When? A. On March 9th. On——

Mr. Kearney: May I inquire—you are reading from something, is that your handwriting?

A. No, this is not. This is the record of the office and the clerk.

Mr. Kearney: Then I object to it on the ground it is incompetent.

The Court: If it is the official record——

A. It is the official record.

The Court: Objection overruled.

Mr. Kearney: Exception.

A. May 18, 1936 the cancellation notices were mailed.

(Testimony of Mrs. Huyck.)

Q. To each of the entrymen as shown by your records? A. Yes, sir.

Q. Were the copies of those letters contained in a franked envelope and deposited in the Carson City postoffice? A. Yes sir.

Mr. Kearney: We move the answer be stricken as conclusion [25] of the witness; unless some record for it, it is purely hearsay. Unless she did it herself, I move the answer be stricken until I can have an objection.

Mr. Craven: I might point out they admitted in their answer they received notice.

Mr. Kearney: I am sure Mr. Depoali hasn't admitted it; I don't know about the others.

The Court: Well, this witness, as I understand it, is *testify* from the records. You have a memorandum to that effect that you are testifying from?

A. Yes sir, we have.

Mr. Kearney: All she is testifying is what the record shows. She can't testify there was a franked envelope dropped in the mail unless she did it herself or saw it done. It is going beyond what the record states. The record merely states the letter was mailed or something of that kind and they can't go that far.

(Question and answer read)

Mr. Kearney: I move the answer be stricken for the purpose of the objection.

Mr. Craven: The testimony shows that is what was done.

(Testimony of Mrs. Huyck.)

The Court: Well, I will permit the witness to testify if they were sent out in the usual way.

A. They were: I usually mail them myself. Of course, I can't testify as to these particular ones, but they all go out in franked envelopes and are mailed in the Carson City postoffice.

Q. At that time you were Register of the Carson City Land Office? [26]

A. I was Register and I usually attend to that myself.

Mr. Kearney: I would like the record to show an exception, if your Honor please?

The Court: Exception may be noted.

Q. Did you receive from the General Land Office a letter dated February 27, 1936, approved by the Secretary of the Interior, or the Acting Secretary, in which each of the entrymen were allowed 30 days from service of that letter by you in which to make payment of interest due as of March 31, 1936, failing in which the entry was to be held for cancellation?

A. Yes sir, we did.

Q. Have you that letter?

A. Yes sir, in each case.

Mr. Craven: We offer each of these in evidence.

The Court: Those might be marked for identification and then considered later.

Mr. Kearney: I object to it as incompetent, irrelevant and immaterial; no foundation laid for its introduction in evidence, and upon the further

(Testimony of Mrs. Huyek.)

ground that it is outside and beyond the power of the particular officer to attempt to cancel, not authorized by Congress or any act of Congress.

Mr. Busey: If the Court please, I would like to make the same objection, that no proper foundation has been laid nor is the order within the scope of the authority of the Secretary of the Interior as granted him by the Act of June 7, 1924. I would like also to make the further objection that the appeal from the General Land Office, attached to the letter, contains a great deal of self-serving matter. It contains the letter of August 30, [27] 1935, in which the Commissioner of Indian Affairs urges denial of the appeals and sets forth his reasons for urging these denials. If the Court please, we would like to object to that portion of the document on the ground it is purely self-serving.

Mr. Kearney: I hadn't noticed there were some exhibits or something else attached to these, some mimeographed copies and I join in the objection made by counsel for certain of the entrymen. The mimeographed copies are no part of the letter.

The Court: For the present the objection will be overruled. They may be admitted with the understanding that they are subject to the objection and all legal questions will be reserved for later consideration.

Mr. Kearney: Exception your Honor.

The Court: Exception may be noted.

Mr. Busey: We also ask an exception.

(Testimony of Mrs. Huyck.)

The Court: Exception in all cases.

Q. Each of the letters has attached to it appeal from the General Land Office applicable to that particular case—did you receive those just this way? A. Yes, we did.

Q. And were those papers attached to the letters? A. Yes sir.

Mr. Craven: We offer these in evidence as one exhibit. May the reporter be instructed, your Honor, to transcribe those into the record so the Register can obtain these originals at a later date.

Mr. Kearney: If they offer photostatic copies, I don't see any necessity of copying these into the record. [28]

Mr. Craven: We will ask to just hold them until a later date and have the Register withdraw them at the proper time.

The Court: They may be marked and later on returned to the Register.

(Testimony of Mrs. Huyck.)

PLAINTIFF'S EXHIBIT T.

Address Only the Commissioner of the General
Land Office.

1 Enc.

1 x R

United States Department of the Interior.

General Land Office.

Washington

Feb. 27, 1936.

In Reply Please Refer to
Carson City 015163 "K" JEW
Garaventa Land & Livestock Company,
Pyramid Lake Indian Reservation.

Payment required.

Register,

Carson City, Nevada.

Sir:

On July 15, 1935, claimant, Garaventa Land & Livestock Company, by their attorney, William M. Kearney, filed an appeal with the Secretary of the Interior, from office decision of April 12, 1935, whereby it was held that claimant would be allowed 30 days within which to make payment in full of the unpaid purchase money, together with interest at four per cent from September 16, 1925, the date of allowance of the entry, to December 31, 1934, or to make payment of the interest only. They were advised if they paid the interest, their entry would not be canceled for non-payment of principal, without giving them further opportunity to make the payment.

(Testimony of Mrs. Huyck.)

On November 25, 1935, the Secretary of the Interior modified said office decision in the following particulars:

(1) All interest due must be paid within 30 days from the date of service hereof;

(2) One-third of the unpaid principal now outstanding must be paid within six months from the date hereof;

(3) The unpaid principal will be computed on the basis of the 1934 reappraisal; and

(4) Interest will be computed by the General Land Office from the date of default.

A recomputation shows \$2,151.78 purchase money due and unpaid as of September 16, 1928, together with interest at four per cent from September 16, 1926, to date of payment which, if the principal is not paid until March 31, 1936, will amount to \$701.09.

You will allow claimant 30 days from the date of service hereof, within which to make payment of \$701.09 interest due as of March 31, 1936, failing in which, the said entry, hereby held for cancellation, will be canceled and the case closed without further notice from this office.

In due time report, transmitting evidence of service of notice.

Very respectfully,
FRED W. JOHNSON,
Commissioner.

(Testimony of Mrs. Huyek.)

Department of The Interior.

Washington.

A. 19152

November 25, 1935.

“K”

: Carson City 015163.

: Requiring payment of unpaid
purchase money and/or interest.

: Modified.

Garaventa Land and Livestock Company

APPEAL FROM THE GENERAL LAND OFFICE.

The Garaventa Land and Livestock Company has appealed from a decision of the Commissioner of the General Land Office dated April 12, 1935, wherein its cash entry, Carson City 015163, was held for cancelation and wherein it was directed that it be advised that its entry would be finally canceled unless within thirty days from notice it should pay the unpaid purchase money amounting to \$2,151.78 with interest thereon at 4 percent from September 10, 1925, the date of entry, to December 31, 1934, amounting to \$799.73, or make payment of the interest.

Appellant was advised if it paid the interest the entry would not be canceled for nonpayment of principal without giving further opportunity to make the payment.

The appeal in this case presents the same question upon a similar state of facts as that involved

(Testimony of Mrs. Huyck.)

in the companion case of J. A. Cerasola, Carson City 015159, in which by decision of this date (A. 19148) the Commissioner's decision was modified. For the reasons stated in a departmental decision A. 19148, a copy of which is made a part hereof, the Commissioner's decision in the present case is modified in the following particulars:

(1) All interest due must be paid within 30 days from the date of service hereof;

(2) One third of the unpaid principal now outstanding must be paid within six months from the date hereof;

(3) The unpaid principal will be computed on the basis of the 1934 reappraisal; and

(4) Interest will be computed by the General Land Office from the date of default.

(Signed) T. A. WALTERS,
First Assistant Secretary.

109594

United States Department of The Interior.
General Land Office.
Carson City, Nevada,
March 9, 1936.

Serial 015163

Garaventa Land & Livestock Co.,
Wadsworth, Nevada.

This office is in receipt from the Commissioner of the General Land Office of a decision involving

(Testimony of Mrs. Huyek.)

the entry or application whose serial number is noted above.

Thirty days from notice are allowed within which to comply with the requirements of the Commissioner, or to appeal therefrom to the Secretary of the Interior; and upon your failure to take action within the time specified the case will be reported for appropriate action. Any showing in response to said decision must be filed in this office, and should refer to the serial number above noted.

The Commissioner's decision, copy of which is inclosed, requires payment etc.

Very respectfully,

.....,
Register.

United States Department of the Interior.
General Land Office.
Carson City, Nevada,
April 14, 1936.

Serial 015163.

Replying to letter "K", dated
February 27, 1936.

Claimant: Garaventa Land & Livestock Co.

PROOF OF SERVICE TRANSMITTED

The Commissioner of the General Land Office.
Sir:

Transmitted herewith is proof of service of the above-mentioned letter. The time allowed thereunder has expired.

(Testimony of Mrs. Huyck.)

Report is made that the party in interest has not made response thereto.

(If additional evidence, appeal or showing made, so state and transmit papers; if registered letter returned unclaimed, transmit same herewith.)

Registry return card herewith.

Very respectfully,

Register.

[Endorsed]: No. 2741-2745. U. S. Dist. Court, District of Nevada. Plff's. Exhibit No. "T". Filed June 19, 1939. O. E. Benham, Clerk. By....., Deputy.

Q. *Mr. Huyck*, did you send a copy of the letter to each of the entrymen concerning his particular entry? A. Yes sir, I did.

Q. How did you send it?

A. By registered mail.

Q. Did you request a return receipt?

A. Yes sir.

Q. And did you receive those return receipts?

A. Yes sir.

Q. When did you mail those registered letters?

A. On March 9, 1936 to Garaventa Land & Livestock Company; March 5—

Q. Just a minute before you proceed further. When was the document sent to the Garaventa Land & Livestock Company received by them?

(Testimony of Mrs. Huyck.)

A. I will have to get these other cards, if I may. Was delivered on March 10, 1936.

Q. The next one, when was it sent and when was it received?

A. The 015159 was received on March 7, 1936; it was sent on March 6th.

Q. Sent to whom and received by whom?

A. J. A. Cerasola and signed by J. A. Cerasola.

[29]

Q. The next one?

A. 015160, W. J. Cerasola, was received on March 7, 1936.

Q. When was it sent?

A. March 5th. Domenico Cerasola, 015161, was delivered on March 10th.

Q. 1936? A. 1936.

Q. When was it sent?

A. On March 9, 1936 it was mailed.

Q. The next one.

Mr. Kearney: Who did you say signed that?

A. W. J. Cerasola.

Mr. Kearney: Domenico Cerasola didn't sign it?

Mr. Boyle: He was dead at that time, wasn't he?

Q. What is the next one?

A. The next one is 015162, M. P. Depaoli, and it was delivered on March 10, 1936, signed by M. P. Depaoli.

Q. When was it sent? A. March 9th.

Q. Did you receive from the General Land Office

(Testimony of Mrs. Huyck.)

letters dated December 15, 1931, applicable to each of these entires, and did you send copies of those to each of the entrymen?

Mr. Kearney: What is the purpose of those behind 1936? We object to that on the ground they are incompetent, irrelevant, and immaterial and not covering any matter in issue in the complaint.

Mr. Busey: Same objection.

Mr. Craven: May I have this understanding, then, with [30] counsel, that on May 22, 1935, there was a demand made and sent to the Garaventa Land & Livestock Company and to M. P. Depoali for the amount of money that was due under the entry; the same dated May 23, 1935 as to Domenico Cerasola; the same as to W. J. Cerasola, May 22, 1935, and the same as to J. A. Cerasola, April 15, 1935?

Mr. Kearney: What is the purpose for it?

Mr. Craven: Simply to show that demands have been made prior to the last demand upon which was predicated the cancellation of the entry.

Mr. Kearney: It seems to me to be immaterial. The first one would be superseded if it were proper demand then and later by the second one.

Mr. Craven: That is true. We simply wish to make an offer of proof at this time that on successive occasions, from 1931 thru 1935 and 1936, demands were made on each of the entrymen and each of the defendants for payment of the amount of the purchase price of the land, and on successive

(Testimony of Mrs. Huyck.)

and several occasions extensions were granted for the payment of the purchase price, until the final demand in 1936, upon which the cancellation was finally predicated.

Mr. Kearney: What is the allegation on this?

Mr. Craven: There is no allegation. The allegation, your Honor, in the complaint is that that ultimate fact, that their entries were finally cancelled for amount of payment not made within the time required, 1936.

Mr. Kearney: I think it is immaterial, your Honor, I think the allegation is not supported and not material to any issue in [31] the complaint. In other words, if counsel have a different theory—the question of the introduction of that letter would place the whole case on a different theory from that which it is placed on now, if it is placed on contractual basis by demand and right to cancel by failure and refusal after demand. We renew our objection—it is incompetent, irrelevant and immaterial and not directed to an issue or allegation of the complaint.

The Court: You are only making offer to prove, as I understand it?

Mr. Craven: Yes, your Honor.

The Court: Have you the record available?

Mr. Craven: Yes, your Honor.

The Court: I will permit it, subject to the objection and consider it later.

Mr. Kearney: May we take an exception?

(Testimony of Mrs. Huyck.)

The Court: Exception may be noted.

Mr. Kearney: If they are material at all—I suppose they were mailed; if counsel says they were mailed to the entrymen, I don't want to take up any time making proof, except as to the admissibility of them and the materiality of them, as I have indicated in my objection.

Mr. Busey: Those demands for payment were for the contract price?

Mr. Craven: Some were and some were not. Some were prior to 1934.

Mr. Busey: May we have the same objection in the other cases, your Honor?

The Court: The record may so show. [32]

Mr. Kearney: Subject to the objection, to save time counsel may read into the record what he desires to prove.

Mr. Craven: I think I have already stated some of the dates and on December 28, 1931 there was mailed to Garaventa Land & Livestock Company, M. P. Depoali, Domenico Cerasola, W. J. Cerasola, and on December 23, 1931 to J. A. Cerasola demands for payment of the sums due under the entry and the subsequent demands in 1935, which I previously mentioned, by registered mail. I think that is all I have of this witness.

Cross-Examination

By Mr. Kearney:

Q. Have you any record of any kind that you

(Testimony of Mrs. Huyek.)

sent notices to the attorney who appeared in the cases, especially notice of appeal and action on appeal? A. It will be on this record if any.

Q. For instance, the letter of May 18, 1936, you never sent notice to any attorneys who appeared in the case, Mr. McKnight or myself?

Mr. Craven: Objected to as immaterial. It doesn't make any difference whether the attorneys were furnished notices or not.

The Court: I will permit the question.

Mr. Craven: Exception.

A. In one case here, June 26, 1935, tissue copy of Commissioner's letter of June 26, 1935 to Mr. McKnight, attorney, at Reno.

Q. That is the only letter?

A. The 30 days have expired for appeal. That is in the case of J. A. Cerasola. In the case of W. J. Cerasola, tissue copy was mailed to Mr. Wm. McKnight at Reno, granting 30 days' extension for appeal; and the same is true of Domenico Cerasola [33] and of M. P. Depaoli, also of the Garaventa Land & Livestock Company.

Q. That was letter of May 22, 1935?

A. Yes.

Q. Extending time 30 days to take appeal, that is correct, is it not? A. Yes sir.

Q. Now, then, on letter of May 18, 1936, have you any such notice?

A. Just the tissue copy mailed to the entrymen, not to the attorney.

(Testimony of Mrs. Huyck.)

Q. Those are letters sent and mailed out to entrymen on March 6 and March 9, 1936, as you have already testified? A. Yes sir.

Q. And without any notice to the attorney who made the appeal?

A. The only notation copy has been mailed to the attorney was extension of time, 30 days, to file an appeal.

Mr. Kearney: I think that is all.

Mr. Busey: We have no questions.

Mr. Craven: May I ask one other question I perhaps should have asked on direct examination.

Q. (Mr. Craven) Notices demanding payment in 1936 which were, I think, copies of letters dated February 27, 1936 from the Commissioner of the General Land Office, which were sent by registered mail, do you have the registry numbers of each of those letters?

A. Yes sir, I think we have. Garaventa Land & Livestock Company was 4990; M. P. Depaoli, 4991; Dominco Cerasola, 4993; W. J. Cerasola 4963; W. J. Cerasola, 4964. [34]

Mr. Kearney: What did you say those dates were please?

A. March 5th for J. A. Cerasola and W. J. Cerasola and March 9th for Garaventa Land & Livestock Company and M. P. Depaoli and Dominco Cerasola.

Q. (Mr. Craven) Mrs. Huyck, I call your at-

(Testimony of Mrs. Huyek.)

tention to plaintiff's Exhibits B, C, D, E, and F, and particularly the photostatic copies of registry return receipts in Exhibit B, No. 4990. Is that the photostatic copy of the original return receipt you just testified from? A. Yes sir.

Q. Exhibit C, calling your particular attention to photostatic copy of registry receipt 4963, is that the photostatic copy of the original receipt that you just testified to? A. Yes sir.

Q. Exhibit D, calling your particular attention to photostatic copy of the registry receipt 4993, is that the photostatic copy of the original receipt that you just testified to? A. Yes sir.

Q. Exhibit E, calling your particular attention to photostatic copy of registry return receipt 4991, is that the photostatic copy of the original receipt that you just testified to? A. Yes sir.

Q. Exhibit F, calling your particular attention to photostatic copy of registry return receipt No. 4964, is that the photostatic copy of the original receipt which you just testified to? A. Yes sir.

Mr. Craven: That is all, Mrs. Huyek.

Your Honor, I handed up copy of the Act in question, could [35] that be filed in the case?

The Court: It may be filed. I assume that is the published statute.

Mr. Craven: It is, your Honor. I just want it filed for the convenience of the Court.

MR. BATH,

a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Craven:

Q. Will you state your name please?

A. Ernest Bath.

Q. Do you occupy any position with the Federal government?

A. Postmaster.

Q. Postmaster at Carson City, Nevada?

A. Yes sir.

Q. How long have you been such?

A. Since March, 1935.

Q. As such, you are the official custodian of all the records and files of the postal department in Carson City, Nevada, is that correct?

A. Yes sir.

Q. Do you have record of a registered parcel or letter bearing registry number No. 4990?

A. Yes sir.

Q. By whom was it sent, to whom and when?

A. It was sent from the United States Land Office to Garaventa Land & Livestock Company, Wadsworth, on 3-9-36.

Q. You have a record of registered parcel or article No. 4991?

A. Yes sir. [36]

Q. By whom was it sent, to whom and when?

A. It was sent from the United States Land Office to M. P. Depaoli at Wadsworth, 3-9-36.

(Testimony of Mr. Bath.)

Q. No. 4993?

A. From the United States Land Office to Domenico Cerasola, Wadsworth, 3-9-36.

Q. No. 4964?

A. From the United States Land Office to J. A. Cerasola, Wadsworth, on 3-5-36.

Q. 4963?

A. From the United States Land Office to J. A. Cerasola at Wadsworth, 3-5-36.

Mr. Craven: Mr. Kearney, I would like the same offer to prove by this witness that he sent registered articles dated May 22, 1935, to the Garaventa Land & Livestock Company and M. P. Depaoli and W. J. Cerasola; on May 23, 1935 to Domenico Cerasola; on April 15, 1935 to J. A. Cerasola; on December 28, 1931 to Garaventa Land & Livestock Company and M. P. Depaoli, Demenico Cerasola and W. J. Cerasola and on December 23, 1931 to J. A. Cerasola; on each of those respective dates to the respective persons named, registered letters were sent by the Land Office in Carson City.

Mr. Kearney: I have no objection so far as proof of sending is concerned, if that be the fact, but I do object to the documents and their contents on the same grounds as I objected heretofore, that they are without any issue in this proceeding, outside the issues, and are wholly irrelevant and immaterial and including all the objections I made to the so-called demands, [37] which were made

(Testimony of Mr. Bath.)

prior to any demand that might have been offered in the pleadings as of 1936.

Mr. Craven: I just offer to prove by this witness that certain registered parcels were mailed to various defendants or protestants, that is all.

The Court: This relates to the same offer?

Mr. Craven: To make the matter clear, Mr. Kearney has stipulated that we did send various demands on these various defendants, but he has objected to its materiality and it is stipuated, subject to that objection, and we are just following that up with this witness that they were sent by registered mail, that is all.

Mr. Kearney: For instance, the so-called demands were made and then they were overruled and appeal taken and extensions granted, so they are becoming material in any event. I have covered the objection to the demands themselves which were offered by letter in 1931 and 1935.

The Court: As I understand it, it is the same matter we had here heretofore.

Mr. Kearney: Yes, except now he is offering to prove that they were sent by registered mail.

The Court: They may be admitted, subject to the objection. We will consider all those matters later.

Mr. Busey: What was the date on which the letter of 1935, I believe in May, was sent to Domenico Cerasola?

(Testimony of Mr. Bath.)

Mr. Craven: In 1935, that was one of the matters I asked you to stipulate to, May 23, 1935.

Mr. Busey: I just wanted to get that date.

Mr. Craven: That is correct, Mr. Bath—the registry number [38] is 3126?

A. Yes, 5-23-35.

Mr. Busey: That is all, thank you. I just wanted to get that date. No further questions.

MISS BOWLER,

a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Craven:

Q. Your name is Alida C. Bowler?

A. Yes.

Q. You are superintendent of the Carson Indian Agency? A. Yes.

Q. And as such the Pyramid Lake Indian Reservation is under your supervision?

A. Yes.

Q. Were you superintendent of the Carson Indian Agency during all the year 1936?

A. Yes.

Q. Did you, on or about June 2, 1936, mail to the Garaventa Land & Livestock Company, M. P. Depoali, Domenico Cerasola, W. J. Cerasola, and

(Testimony of Miss Bowler.)

J. A. Cerasola, a letter concerning their entry and right to purchase certain land within and upon the Pyramid Lake Indian Reservation?

Mr. Kearney: Objected to as incompetent, irrelevant and immaterial—whether she did or not is immaterial. She has no power to control the Secretary of the Interior or the Acts of Congress, except by special Act of Congress and the authority within the special Act of Congress, and whether she sent a letter or not, I submit is wholly immaterial, regardless of what the letter is. [39]

Mr. Busey: Same objection.

The Court: We will take the testimony subject to the objection and consider it later.

Mr. Kearney: Exception.

Q. Will you answer the question?

A. Yes.

Q. How were those letters sent?

A. By registered mail.

Q. You have copies of them in your possession?

A. Yes.

Mr. Craven: We demand the originals from the defendants.

Mr. Kearney: We don't know anything about them.

A. There are receipts attached.

Mr. Craven: We ask that this be marked for identification please.

Clerk: Plaintiff's Exhibit U for identification.

(Testimony of Miss Bowler.)

PLAINTIFF'S EXHIBIT U
(For Identification)

Carson Indian Agency
Stewart, Nevada
June 2, 1936

Garaventa Land & Livestock Company
c/o Frank L. Garaventa
Wadsworth, Nevada.

Subject Cancellation Entry 015163

Gentlemen:

The Commissioner of Indian Affairs has advised us that your Pyramid Lake Entry 015163 covering 236.14 acres of land has ben cancelled because of your failure to make the required payments under the contract. The land is to be returned to the possession of the Pyramid Lake Reservation Indians. The Register of the Land Office at Carson City advises that a notice of this cancellation was mailed to you on May 18.

Following instructions received from Washington and on behalf of the Pyramid Lake Indians I am hereby serving notice that you are to vacate the Pyramid Lake Indian Reservation Land covered by this entry on or before September 30, 1936.

This date was selected by the Pyramid Lake Tribal Council in conference with me at a meeting held on last Thursday, May 28. The Indians decided to be reasonable and not to require too early re-

(Testimony of Miss Bowler.)

moval because it is our understand that you have put in certain crops this year and because you will need time to make arrangements for establishing yourselves elsewhere. At this same meeting it was decided that as tenants of the Pyramid Lake Indian Reservation you should be required to pay a reasonable share of this year's crop raised on Indian Lands to the Reservation as rental. I have consulted the University of Nevada Extension Division, which we believe to be an unbiased organization, as to what might be considered a fair crop share. On their advice I am asking that in the harvesting of your crops the following amounts be set aside as rental payments to the Indians.

Potatoes and other garden truck.....	1/4
Grain	1/3
Alfalfa	1/2

Should you wish to discuss these arrangements with the Tribal Council and the Agency please so advise and we will arrange a meeting for that purpose.

Sincerely yours,

ALIDA C. BOWLER,

Superintendent

ACB/gcp

cc—Commissioner of Indian Affairs (2)

Pyramid Lake Tribal Council

[Receipt for Registered Article No. 156 Attached
—addressed to Carson Ind. Agency, Stewart Ne-

(Testimony of Miss Bowler.)

vada—signed “Garaventa Land & Livestock Co., by Joe Garavento.”]

[Endorsed]: No. 2741-2745 U. S. Dist. Court, District of Nevada. Plff’s. Exhibit No. “U” for Ident. Filed June 19, 1939. O. E. Benham, Clerk. By....., Deputy.

Q. Calling your attention to government’s Exhibit U for identification, are these full, true and correct copies of the letters sent to each of the persons I have heretofore named? A. Yes.

Q. They were sent by registered mail?

A. Yes.

Mr. Craven: We offer them in evidence.

Mr. Kearney: We object on the ground no foundation has been laid; wholly irrelevant and immaterial, regardless of the contents.

Mr. Busey: Same objection, if the Court please.

The Court: The ruling might be reserved. If the registry receipts show a return, that might be important; [40] show that they were delivered.

Q. Did you write those letters pursuant to any instructions from the Commissioner of Indian Affairs? A. Yes.

Q. I show you government’s Exhibit V for identification and ask you whether or not that is letter of instruction to you to write the letters mentioned? A. It is.

(Testimony of Miss Bowler.)

Mr. Craven: We offer this in evidence.

Mr. Kearney: If the Court please, I object to the offer upon the ground that the Commissioner of Indian Affairs has no jurisdiction or authority over the lands in the Pyramid Lake Indian Reservation, excluding the town of Wadsworth, set aside and set apart for Indian Reservation by the Act of 1924; therefore, any letter from the Commissioner to Miss Bowler is wholly irrelevant and immaterial and incompetent and does not tend to prove or disprove any issue in this case. It is purely a self-serving document.

Mr. Busey: Same objection, if the Court please.

Mr. Kearney: And upon the further ground there is no foundation laid for the offer.

Mr. Craven: Your Honor, that is all predicated upon the legal question whether or not the Secretary of the Interior had power and authority to cancel the entries. If he did not, the letter, of course, is inadmissible. If he did have such power, then the letter is admissible, for the reason that the Act of June 7, 1924 expressly provides that in the event of those lands reverting to the government, they shall revert to the Piute Indian [41] tribes of the Pyramid Lake Indian Reservation and of which Commissioner Collier, of course, had jurisdiction, and both U and V, the letter from the Commissioner of Indian Affairs, instructing the witness to write letters to the new entries, and letters from the witness to each of the entrymen, making demand on them to yield the premises, are pertinent

(Testimony of Miss Bowler.)

to show the demand to yield the premises that they have been holding unlawfully since the cancellation of the entry, which they have been doing as alleged in the complaint.

The Court: I am inclined to think they should be admitted, at least for the purpose of the case. I can reserve ruling. If you have any questions you want to ask the witness, I suggest counsel get together. We will take a recess until 1:30.

(Recess taken at 12:10).

PLAINTIFF'S EXHIBIT V

Address Only the

Commissioner of Indian Affairs

Refer in Reply to the Following:

L-A

2839

United States

Department of the Interior

Office of Indian Affairs

Washington

Airmail

May 20, 1936

Miss Alida C. Bowler,
Supt., Carson Agency.

My dear Miss Bowler:

There are enclosed two copies of a General Land Office letter of May 13, approved by the Acting Secretary on the same date, canceling certain homestead entries on the Pyramid Lake Reservation because of the failure of the entrymen to comply with

(Testimony of Miss Bowler.)

Departmental decisions of November 25, 1935.

The entrymen do not have the right of appeal. You should give the entrymen notice that they will be required to vacate the lands. Written notice should be given each and a copy of the notice forwarded to this Office. A reasonable time should be allowed each to remove from the lands. In determining what is a reasonable time in each case, you should consider the time which will actually be required by each and also the fact that in the past the Department has been very liberal toward these entrymen, which undoubtedly caused them to become more permanently located than they would have otherwise. It is not now expected that you will grant them any special privileges. However, you should also refrain from causing them any undue hardship.

Official notice of the cancellations will be given the entrymen by the Register of the local land office at Carson. You should ascertain when such notice is given and not serve notice to vacate upon the entrymen until after they have been formally notified of the cancellations.

Please keep this Office advised of all developments. If the entrymen do not vacate within the periods granted by you, prompt report should be made setting forth all facts.

Sincerely yours,

WM. COLLIER,
Commissioner.

Enclosure 1119995

(Testimony of Miss Bowler.)

United States
Department of the Interior
General Land Office
Washington

May 13, 1936

In reply please refer to
Carson City 015159 "K" HHS
015160-015161-015162
015163-015164

Pyramid Lake entries canceled.

Register,
Carson City, Nevada.

Sir:

By letters of February 27, you were instructed to allow the entrymen in the above enumerated entries 30 days from receipt of such letters within which to make payment of the interest due on their respective entries, covering lands within the Pyramid Lake Indian Reservation, in accordance with departmental decisions, A 19148, 19149, 19150, 19151, 19152 and 19153, all dated November 25, 1935.

You have submitted evidence of service of the said letters of February 27, by transmitting registry return receipts showing notices served March 7 on entrymen of entries 015159 and 015160, and notice served March 10 on the remaining four entrymen. You also reported that no action had been taken by the entrymen excepting Guiseppe Gardella, who made payment of interest of \$237.27 which was the amount called for in entry 015164.

(Testimony of Miss Bowler.)

Therefore, since the entrymen holding entries 015169, 015160, 015161, 015162 and 015163 failed to pay the interest required, those entries are hereby canceled and the cases closed.

You will note your records as to the cancellation of the five entries and advise Mr. Gardella that since he has paid the interest called for he will be allowed until September 10, 1936, to make payment of the one-third purchase money due at that time.

Very respectfully,

FRED W. JOHNSON

Commissioner.

Approved: May 13, 1936.

(Sgd.) CHARLES WEST

Acting Secretary.

[Endorsed]: No. 2741-2745 U. S. Dist. Court, District of Nevada Plff's Exhibit No. "V" for Ident. Filed June 19, 1939. O. E. Benham, Clerk. By , Deputy.

Afternoon Session

1:30 P. M.

Mr. Craven: We have no further questions on direct examination.

At this time we offer in evidence all those certified documents we have heretofore offered in each of the cases before the Court, where any of those exhibits might apply to that particular case.

(Testimony of Miss Bowler.)

Mr. Kearney: We have not had a chance yet to read them all during the noon hour, your Honor, they are quite long, but I do want the general objection to go in at this time, with the right to make the further objection after we read them, that the docu- [42] ments are self-serving in many respects and I want to point out the particular ones that are purely self-serving; that they are, for the purposes of this case, irrelevant, incompetent and immaterial, particularly in that they are letters and documents outside the scope of the Act of 1924, by which the lands of the five defendants, covered by entries of the five defendants under the Act of 1924, were withdrawn from the Indian Service entirely, withdrawn by Congress, from the jurisdiction of the Commissioner of Indian Affairs, and that since that time the monies only that are coming from those lands are available for the Indian fund, and not the lands themselves; that many of the documents which are mixed up indiscriminately in the various exhibits do not bear signatures and they are copies which are interdepartmental letters, which do not affect and can not affect the rights of the defendants to the occupation and control of the land; that there is no foundation laid for the offers, nor any of them. I want to supplement that objection after I read each one, by making it more specific, and if it might be understood that we could even put them in writing, I would like to do so, with the Court's permission.

(Testimony of Miss Bowler.)

Mr. Boyle: You mean to write a brief?

Mr. Kearney: Oh no—we will do that of course, later. I mean before—obviously, I haven't had time to read 250 pages or more of photostatic copies of records and letters, which were for the first time presented to us at 10:00 o'clock this morning, or later.

Mr. Busey: If the Court please, I would like the same objection to go to the three cases I represent.

[43]

The Court: I will permit a brief written statement of objections to be filed later. Any cross-examination?

Mr. Kearney: No, no cross-examination.

Mr. Craven: The government rests.

Mr. Kearney: Mr. Depaoli, will you take the stand please?

MR. DEPAOLI,

being first duly sworn, testified as follows:

Direct Examination

By Mr. Kearney:

Q. What is your name please?

A. M. P. Depaoli.

Q. You are one of the defendants in this action
Mr. Depaoli? A. Yes.

Q. Where do you live at the present time?

A. On a ranch.

Q. Where?

(Testimony of Mr. Depaoli.)

A. One and one-half miles below Wadsworth.

Q. And is some of the land involved in that particular ranch designated in this suit as covered by entry of the application to purchase that you made in 1925?

A. It is.

Q. Have you any patented land there?

A. I have.

Q. How much patented land is involved in your ranch?

A. 160 acres.

Mr. Craven: We object and move the answer be stricken, on the ground it is incompetent, irrelevant and immaterial, has no bearing upon the issues in this case.

The Court: We will consider that later. The objection will [44] be overruled for the present. It may stand subject to the objection.

Mr. Craven: Exception.

Q. How many acres of patented land have you?

A. 160.

Q. How did you acquire that land, thru State patent or Federal patent, or how?

Mr. Craven: Same objection.

The Court: Same ruling.

Mr. Craven: Exception.

Q. Do you know how the patent was issued, whether it was a State patent?

A. I don't recollect.

Q. Is this 160 acres within the confines of what is called the Depaoli Ranch?

A. It is.

Q. How many acres of cultivated land are there

(Testimony of Mr. Depaoli.)

in the entry that you made in 1925 under the Act of 1924?

Mr. Craven: Same objection.

The Court: Same ruling.

Mr. Craven: Exception.

The Court: Doesn't the record here show in the case?

Q. I am speaking now of the area of irrigated land.

A. If I remember correctly, I think it is something around 300 acres.

Q. That is the land irrigated in your 160 acres of patented land and Indian land as well?

A. Yes. [45] A. Yes.

Q. What we will refer to here in this case as Indian land.

A. Well, I don't know, because as far as I know it is all surveyed in one.

Q. It is all one tract of land? A. Yes.

Q. Is that land fenced? A. It is.

Q. Is it ditched? A. It is.

Q. Cross ditched? A. Yes.

Q. Any improvements on it? A. Houses.

Q. What houses?

Mr. Craven: We object to the question on the ground it is incompetent, irrelevant and immaterial and has not been made an issue in this case.

The Court: I am inclined to think the objection is good, but if it has some bearing, I will permit it, subject to the objection.

(Testimony of Mr. Depaoli.)

Mr. Kearney: In the light of the recent decision from the Circuit Court of Appeals, the question of the present condition——

The Court: We will consider those things, all those matters, later.

Mr. Craven: Exception.

Q. You say houses?

A. Houses, corrals—— [46]

Q. Just go ahead and state all the improvements.

A. Well, houses, corrals, cellars and fence, cultivated land.

Q. What is growing on the land?

A. Well, alfalfa and other crops that I plant.

Q. How long have you personally lived on the land? A. Twenty years in February.

Q. And did your father have the land prior to that time, to your knowledge?

A. Not this place I am on now. My father-in-law had it.

Q. Was it necessary to level that land before it was placed in cultivation?

A. Well, some of it was leveled and I did a great deal of levelling myself.

Q. In the original state, the adjacent lands, can you tell whether it required levelling to bring it into cultivation? A. It certainly did.

Q. The land that you levelled yourself and cultivated, what was the average cost for breaking the land from the rough condition and putting it in a state of cultivation?

(Testimony of Mr. Depaoli.)

Mr. Craven: Same objection.

The Court: Same ruling.

Mr. Craven: Exception.

Q. In labor, etc.

A. Something like \$100 to \$125.

Q. That includes plowing and seeding and ditching and construction of ditches for it?

A. Yes.

Q. Where is the water derived from, from what source? [47]

A. From what is known as Proctor ditch.

Q. From where does that get its supply of water? A. From the Truckee River.

Q. Have you made any payment to the Land Office at Carson City for this land under the entry that you made in 1925? A. Yes, I did.

Q. To whom did you pay the money?

A. The United States Land Office, Carson City.

Q. Did you obtain a receipt for it?

A. Yes sir.

Q. And up to the time until after this suit had been filed, did you receive any money that had ever been tendered back to you? A. No.

Q. Did you recently, just a few days ago, or few weeks ago, receive a letter tendering this money back to you?

A. Not the money I paid in 1925.

Q. I mean the full payment under your contract? A. Yes.

Q. What did you do with the check that came?

(Testimony of Mr. Depaoli.)

A. Returned it to its original source.

Q. How long had the government kept that money that you paid in complete fulfillment of the terms of your contract?

Mr. Boyle: We object, it calls for conclusion of the witness, legal conclusion.

The Court: The objection goes to the form of the question. You can ask him how long the government retained the money.

Q. How much money did you pay into the Land Office under your [48] contract of purchase, the final payment?

A. \$5116.62, something like that; I don't know.

Q. You have a pretty good memory—that appears to be it. And when did you pay that to the Commissioner or to the Register of the United States Land Office?

A. On August 11, 1936.

Q. And was it accepted at that time?

A. Yes sir.

Mr. Craven: We object, as calling for conclusion.

The Court: Simply state whether they received and kept the money.

Q. Did the Register of the Land Office receive and keep the money? A. They did.

Q. And until April 17, 1939, just a month ago, did you ever receive any advice that they had not accepted that money in Washington?

A. No.

Q. I hand you a copy of a letter and ask you if

(Testimony of Mr. Depaoli.)

you received that. A. You mean the check—

Q. If you received the letter or that document?

A. Yes.

Q. Was there anything with it when you received it?

A. A government check for that amount.

Q. That is \$5116.62? A. Yes.

Q. What did you do with that check?

A. Sent it back.

Q. Who received that letter—did you receive it, the letter con- [49] taining the check, or did some one else receive it?

A. I think some of the children brought it out.

Q. Were you home at that time?

A. No.

Q. How long was it before it was called to your attention? A. It was several days.

Q. I hand you now what purports to be a copy of a letter returning the check. Did you send that letter with the check? A. I did.

Q. That is a copy of it? A. It is.

Q. By whom was that letter signed? That is a carbon copy.

A. It was signed by M. P. Depaoli.

Q. That is yourself? A. Yes.

Mr. Kearney: We offer this letter in evidence.

Q. Since writing that letter, have you had any reply to it? A. No.

Q. You enclosed the same check?

A. I did.

(Testimony of Mr. Depaoli.)

Q. That came with the letter to you of April 17th? A. I did.

Mr. Craven: We object to it because it is entirely immaterial; self-serving declaration.

The Court: The objection will be overruled. It will be admitted subject to the objection. We will consider the legal phases of it later.

Mr. Craven: Exception. [50]

Clerk: Case No. 2744, Defendant's 1.

Q. Did you send that letter by registered mail?

A. I did.

Mr. Kearney: We offer in evidence the return registry card, bearing the signature of somebody, disbursement officer, date of delivery May 15, 1939 at the Federal Reserve in San Francisco.

Mr. Craven: Same objection.

The Court: Same ruling.

Mr. Craven: Exception.

Clerk: Case No. 2744, Defendant's Exhibit 2.

Q. Mr. Depaoli, how far from the Indian Agency on the Pyramid Lake Reservation are your lands situated?

Mr. Craven: Objected to as entirely immaterial.

The Court: I am impressed it is immaterial, but if you think there is any materiality about it, you may state so.

Mr. Kearney: If the Court please, we are trying to show the equities are all in favor of the defendant. This man is familiar with irrigated lands on the Reservation; that there is no need whatsoever

(Testimony of Mr. Depaoli.)

for these lands for the Indians, aside from the legal phase of it.

The Court: Isn't this case purely law, not equity?

Mr. Kearney: I don't know. If it is a case of equity, then I don't think the Court has jurisdiction. You might say it is a question whether or not the United States, in the form they brought this action, could maintain an action, and if the theory of the government is correct, that these lands were transferred to the Indians by the Wheeler-Howard Act, then certainly they can't [51] bring action on rejectment without naming the Indians and making the Indians a party to the suit.

Mr. Craven: That point has been already decided on the motion to dismiss. That was the sole ground.

Mr. Kearney: Not the sole ground.

Mr. Craven: The principal ground, and the Court decided that adversely to the contention I made.

The Court: I don't want to go to great length in any of these matters. I will permit the main question. This question may be answered, subject to the objection.

Mr. Craven: Exception.

(Question read)

A. I wouldn't be exact. I think something like 17 or 18 miles.

Q. How many acres of land, if you know, are irrigated at the Indian Agency by the Indians?

Mr. Craven: Objected to as wholly incompetent, irrelevant and immaterial.

(Testimony of Mr. Depaoli.)

The Court: My impression is the objection is good. If counsel thinks this may have a bearing, I will permit it.

Mr. Kearney: I say frankly, your Honor, I am putting in this line of testimony because of the decision just rendered by the Circuit Court of Appeals in the Walker River case, where they took those matters into consideration, aside from the question of law, and decided the case not on the question of law, but on the question of equity. [52]

Mr. Craven: We submit this is not comparable to the Walker River case. Counsel might make a statement and maybe we might agree witnesses will testify to these matters and save time.

Mr. Kearney: I think some of these things are embodied in the letters and reports from the Secretary of the Interior and the Commissioner of Indian Affairs, and I might offer the letters as to their content in these official reports, subject to your objection as to their competency. Of course, we won't offer opinions and matters of that kind, but the facts as they appear from the records and contained in this correspondence and in these reports.

Mr. Craven: That will be agreeable.

Mr. Kearney: Then I would like to offer in evidence a letter on the letterhead of the United States Department of the Interior, General Land Office, Washington, December 19, 1929. It says, in reply please refer to 1338675 "L" JPMcP. Memorandum

(Testimony of Mr. Depaoli.)

to the Secretary thru the Commissioner of Indian Affairs. Now it is quite a lengthy report and we would like the privilege of just taking one of these reports and offering it as an exhibit, to avoid reading it at this time, and I think probably the contents of these reports made by the Commissioner of Indian Affairs will sufficiently cover the testimony that Mr. Depaoli would be asked to cover.

Now then the next is a Senate report, concerning the Pyramid Lake Indian Reservation and a letter addressed to Hon. Charles Curtis, from the Department of the Interior, dated Washington, October 17, 1921, and it is addressed to Charles Curtis, Chairman of Committee on Indian Affairs, U. S. Senate, stating [53] certain facts and signed E. C. Finney, Assistant Secretary of the Interior. He was Assistant Secretary of the Interior, just signed "Assistant Secretary." We will furnish a copy of that. We do not offer the opinions of the various parties. That is obviously not evidence.

Then I want to offer the report made to the Commissioner of Indian Affairs, Washington, D. C., dated Reno, Nevada, September 29, 1924, which contains a complete tabulation of the areas and the acres in the various ranches that are involved in this proceeding, eliminating, of course, from our evidence the lands that are not involved. There are some others in the report that are not involved here and that appears to be attached to a letter addressed to the Secretary of the Interior, signed by Ira Lantz,

(Testimony of Mr. Depaoli.)

Special Agent of the General Land Office, and James E. Jenkins, Superintendent of the Reno Agency.

Then I would like to offer in evidence a letter dated Washington, October 26, 1934, Department of the Interior, General Land Office, addressed to the Secretary of the Interior and signed "Antoinette Funk, Acting Commissioner."

Then I would like to offer in evidence the report of the Senate Committee on Indian Affairs, Senate Report 839, the 75th Congress.

I think those cover the facts, altho there are some opinions contained in them aside from references to decisions. We will furnish counsel with a complete copy and ask that all those documents be marked as one exhibit, subject to counsel's objection.

The Court: Let me suggest that you have a printed copy containing all the matters referred to that [54] could be marked for identification. The Court would prefer to reserve ruling on the admissibility.

Mr. Kearney: We would be glad to do that. There is a lot of matter not material in the printed report, but that is satisfactory. We will mark the ones we offer.

The Court: You have referred to certain ones and those will be the ones that will be up for consideration later.

(Testimony of Mr. Depaoli.)

Mr. Kearney: That is satisfactory. I will get one of these which contains the referenece to particular pages and the letters we have referred.

Mr. Craven: Let the record show, may it please the Court, that for convenience to counsel, we do not object to the form that the documents now offered are in. In other words we do not insist that they produce properly authenticated copies or the originals of the documents, but we do object to them on the ground and for the reason that those documents, if the originals were offered, are incompetent and immaterial; no foundation has been laid for their admissibility in themselves, and further, the contents of each of those documents are wholly immaterial and incompetent to prove or disprove any of the issues in this case.

Mr. Kearney: Mr. Craven, I thought the question of the foundation was waived, as I understood it.

Mr. Craven: Yes, that is what I am trying to point out, that we do not insist that counsel produce originals or properly [55] authenticated copies of them, but we do object to the documents because no foundation has been laid for the originals or properly authenticated copies and the contents of them are immaterial.

Mr. Kearney: But in your objection as to the foundation you do not include the lack of authenticity of the documents themselves? In other words, we do not want to have to get original copies and

(Testimony of Mr. Depaoli.)

photostat them and have them certified by the proper officer.

Mr. Craven: I say that they may be offered as tho they were the originals.

Mr. Kearney: But ordinarily within the question of foundation we must prove authenticity of the documents.

The Court: I understood that is waived.

Mr. Busey: May it likewise be understood that the documents are offered in conjunction with all applied cases?

The Court: Then it may be marked for identification. The Court will reserve ruling on the objection.

Clerk: Defendant's 3.

Mr. Craven: Let the record show that Mr. Kearney has pamphlet with pink slips indicating the parts.

Mr. Busey: I have inserted the number of some pages in addition where the documents are set forth in the pamphlet.

Mr. Kearney: I think we had better draw a red line around the letters and documents we offer.

The Court: That can be done later. The reporter's notes disclose what has been offered.

Mr. Craven: What is the ruling?

The Court: Ruling is reserved. [56]

Mr. Craven: Exception.

Q. Mr. Depaoli, you are willing to carry out the purchase of the land in the event any question arises concerning payment of the land?

(Testimony of Mr. Depaoli.)

Mr. Craven: Objected to as immaterial and incompetent.

The Court: Objection overruled. Same exception.

A. I have already paid for it.

Mr. Kearney: Will you stipulate that that money reached the United States Treasury and stayed in the Treasury for some two years before they offered to try to return it to him?

Mr. Craven: I don't know if I could do that. I don't know where the money has been. All I know is the Secretary of the Interior rejected the offered money many months ago. Whether or not he got the money or when he got it, I don't know.

Q. (By Mr. Kearney): So far as you are concerned, the money was out of your possession and had been receipted for by the Registry Land Office?

A. Yes.

Q. And it was two years afterwards and after the filing of this suit that you received a tender of the money back, is that correct, an offer of the money back to you? A. Yes.

Q. And you refused to accept it? A. Yes.

Q. And that was the amount of money that would pay up your contract in full, was it?

A. Yes.

Q. Aside from that, will you state how much money you paid to [57] the government from this amount, aside from the last payment of \$5116.62?

A. Paid \$2514.00 some time in '25.

(Testimony of Mr. Depaoli.)

Q. So all told you had paid \$7631.62, is that correct?

A. I haven't totaled it—I imagine it is.

Q. You allege in your complaint \$7631.44, that was the amount specified in the contract?

A. Yes.

Q. With interest?

A. I guess it was.

Q. The \$5116.62 included interest, did it not?

A. Yes.

Mr. Kearney: I think that is all.

Cross Examination

By Mr. Craven:

Q. Mr. Depaoli, from the time you paid the original down payment in 1925 until you submitted this money to the Register of the Land Office in 1936, you made no other payments, did you?

A. No.

Q. Mr. Depaoli, you got notice of the cancellation of that entry, didn't you? A. Yes.

Mr. Kearney: I object; it is not cross-examination.

The Court: This question has been asked and answered. It may stand.

Q. You got notice from Miss Bowler, demanding—

Mr. Kearney: Objected to on the ground it is not cross-examination.

Q. —demanding that you give up the premises?

(Testimony of Mr. Depaoli.)

Mr. Kearney: Objected to.

The Court: That is in evidence, that the letters were sent. I will permit the question. It may be answered if he had notice.

Q. Did you get that notice, Mr. Depaoli?

A. Yes.

Q. You are still in possession of the property, aren't you? A. Yes.

Q. You got other notices before 1936 demanding payment of the interest and principal?

Mr. Kearney: Objected to on the ground it is incompetent, irrelevant and immaterial, not cross-examination.

The Court: I think that has been covered by some testimony on the part of the plaintiff.

Mr. Kearney: The situation with reference to that, if your Honor desires to have your memory refreshed—he made references to certain notice in 1930 which resulted in appeal to the Secretary of the Interior, which were later nullified and which they waived. In other words, all previous notices of payments of requirement of payment were waived by extensions of time, etc., and is not a matter in issue here now.

The Court: You mean extensions were granted?

Mr. Kearney: Yes, that is tacitly admitted in the letters they have introduced, that they have received extensions of time.

Mr. Craven: There is a question raised on behalf of defendant, so we wish to show that since

(Testimony of Mr. Depaoli.)

1925 there have been repeated demands and extensions of time, and as a matter of fact, reappraisements and reduction in the price and offer to prove that [59] the government has cooperated in every way possible.

The Court: Well, I will permit a brief showing along that line.

(Question read)

A. Yes.

Q. You participated in appeal from the General Land Office to the Secretary of the Interior, did you? A. Yes.

Q. And you had notice of the ruling of the Secretary of the Interior? A. Yes.

Q. And they gave you *time* in which to pay the principal and the interest? A. Yes.

Q. But you didn't do it, is that correct, until after the cancellation?

A. No, I couldn't pay it until I had the money.

Q. It never was paid until after cancellation?

Mr. Kearney: We submit that calls for legal conclusion, as to whether or not there was a cancellation.

The Court: Well, it may be notice of cancellation. It is the document that has been introduced. I think it has already been asked when payment was made and the amount thereof and that there were no other payments made.

Mr. Craven: That is all.

(Testimony of Mr. Depaoli.)

Redirect Examination

By Mr. Kearney

Q. In 1930 were any demands made or notice to pay before that time and up to 1936, when you actually made payments—you had al- [60] ways obtained extensions, is that correct?

A. I thought I had.

Q. And there had been a number of extensions granted during the depression, had there not?

A. Yes.

Q. And at one time there had been an addition made to the price of these lands, which had been fixed upon the basis of their improved value rather than upon the basis of their raw value, isn't that correct?

A. I think so.

Q. And you were successful in having the appraised value reduced somewhat?

A. Yes.

Q. And you had made another application for further relief to have the values reduced from the Trowbridge valuation?

A. Yes.

Q. And were you encouraged in making that application by any government official?

Mr. Craven: Objected to, if the Court please, as not material.

The Court: I think that is objectionable. Objection sustained.

Mr. Kearney: I think that is all.

(Testimony of Mr. Depaoli.)

Recross Examination

By Mr. Craven

Q. The lands in 1934 were reduced \$10.00 an acre, weren't they?

A. I don't remember what the reduction was.

Mr. Craven: That's all.

Mr. Kearney: You don't claim there was any reduction of \$10.00 an acre? [61]

Mr. Craven: Yes.

Mr. Kearney: I think it is based on that original price in the Secretary's letter. I think that is all we have on the Depaoli case.

Case 2745

Mr. Busey: Call Mr. Cerasola.

MR. W. J. CERASOLA,

being first duly sworn, testified as follows:

Direct Examination

By Mr. Busey

Q. Will you please state your name?

A. W. J. Cerasola.

Q. Where do you live at the present time, Mr. Cerasola?

A. Wadsworth.

Q. You live on a ranch near Wadsworth?

A. Yes.

Q. What is the name of that ranch?

A. Cerasola Home Ranch.

(Testimony of Mr. W. J. Cerasola.)

Q. Of approximately how many acres does that ranch consist?

A. Do you mean the cultivated land or all of it?

Q. All together. It contains 488 acres in the lands described in the complaint, does it not?

A. Yes.

Q. And there are in addition to that some other lands?

A. About 600 acres.

Q. That is in all?

A. In all, yes.

Q. There are 488 acres of land described in case No. 2745?

A. Yes. [62]

Q. And in addition you have that patented land, have you?

A. Yes.

Q. How many acres of patented land?

A. 120.

Q. Was that patent secured from the State of Nevada?

A. Yes.

Q. In addition to the Cerasola Home Ranch is there a ranch known as the Olinghouse Home Ranch and the Howell Ranch?

A. Yes.

Q. How many acres does that consist of?

A. 480.

Q. That is the land described in the complaint in case No. 2743?

A. Yes.

Q. Is there also a ranch known as the Hamilton Ranch and Hill Ranch?

A. Yes.

Q. Does that consist of approximately 506 acres?

A. Yes.

Q. That is the land described in the complaint in case No. 2742?

A. Yes.

(Testimony of Mr. W. J. Cerasola.)

Q. When did you first live on the Cerasola Home Ranch, Mr. Cerasola? A. 1901.

Q. Since that date have you lived there continuously? A. Yes.

Q. Who was in charge of the ranch from 1901?

Mr. Boyle: Objected to as incompetent, irrelevant and immaterial; not germain to the issues of this case. It doesn't make any [63] difference who had charge of it, your Honor.

The Court: I can't see the materiality of it.

Mr. Busey: There are three different ranches and they have been under charge of one person and we simply wish to show that Mr. Cerasola now runs all three ranches and is familiar with all three and before him his father was.

The Court: You may make that showing.

Q. Your father was in charge of the ranches after 1901, was he? A. Yes.

Q. Is your father living at the present time?

A. No.

Q. When did he die? A. 1930.

Q. Is your mother living at the present time?

A. No.

Q. When did she die? A. 1930.

Q. Since 1930 have you been in charge of all three ranches? A. I have.

Q. Is your brother J. A. Cerasola?

A. Yes.

Q. Does he assist you in the operation of the three ranches? A. Yes.

(Testimony of Mr. W. J. Cerasola.)

Q. You are in charge of the ranch that is owned by him? A. Yes.

Q. That is the Hamilton Ranch and Hill Ranch?

A. Yes.

Q. What sort of crops are raised on these ranches, Mr. Cerasola? [64]

A. Alfalfa, grain, and potatoes.

Q. Have you been raising crops similar to that since you first went on there? A. Yes.

Q. What sort of improvements have you made?

Mr. Craven: Objected to as incompetent, irrelevant and immaterial; not bearing upon the issues of the case.

The Court: I will permit it.

Mr. Craven: Exception.

A. Camp buildings, fences, ditches, cultivated lands.

Q. Have you drilled any wells? A. Yes.

Q. You have built houses there for yourself and family? A. Yes.

Q. You have a windmill? A. No.

Q. Do you have an irrigating system thruout all the ranches? A. Yes.

Q. Are these ranches adjoining each other, Mr. Cerasola? A. They are in a way, yes.

Q. Do you have a common irrigating system for them? A. Yes.

Q. And does that include an irrigating system for the 120 acres of patented land? A. Yes.

(Testimony of Mr. W. J. Cerasola.)

Q. The irrigating system for the patented land is in common with the land here in question?

A. Same irrigates all. [65]

Mr. Craven: May it be understood my objection goes to all these questions?

The Court: It is so understood.

Q. Since the year 1925 have you cleared and levelled any lands in question here? A. Yes.

Q. Approximately how many acres?

A. Around 75 acres.

Q. Can you estimate what the cost of clearing and levelling the land was to you?

A. Well, an average of \$125.

Q. That is \$125 per acre? A. Yes.

Q. Since you have been on the property, have you paid the taxes? A. Yes.

Mr. Craven: Objected to as entirely immaterial.

The Court: It has been asked and answered. I will permit it. We will consider it later.

Mr. Craven: We move it be stricken.

The Court: I will take that under advisement.

Q. After the entry which you and your brother and your father made upon each of these three pieces of land involved in the three cases here, did you pay any portion of the purchase price?

A. Yes.

Q. On the Cerasola Ranch what portion of the purchase price did you pay?

A. Paid a quarter of the appraisal made at that time. I don't know just what the exact figures are.

(Testimony of Mr. W. J. Cerasola.)

Q. The appraisal made at that time was approximately \$9500? A. Yes.

Q. Was that appraised price thereafter reduced?

A. Yes.

Q. When was it reduced? Was it about the year 1934, in November?

A. I believe it was.

Q. Did you make any effort to have that reduction in the appraised value brought about?

A. Yes.

Q. You made that effort during a period of years from 1925 to 1934? A. Yes.

Q. What did you do in that respect?

A. Tried to get some relief on it.

Q. Just what did you do?

Mr. Craven: Same objection.

Q. Did you take it up with the Land Department?

Mr. Craven: We object to it, your Honor.

The Court: Unless it is along the same lines of appeal or anything of that kind.

Q. Yes—did you make an appeal to the Secretary of the Interior? A. Yes.

The Court: I will permit that, subject to the objection.

Q. After the lands were re-appraised, what was the re-appraisal value?

A. I don't recollect just what the exact amount was. It was reduced some.

(Testimony of Mr. W. J. Cerasola.)

Q. It was around \$5,000 for the Cerasola Ranch, was it not? [67] A. Yes.

Q. And there was a similar reduction for each of the other ranches?

The Court: A reduction from \$9,000 to \$5,000?

Mr. Busey: Yes sir. Re-appraisment in 1934 reduced the appraised value from about \$9,000 to \$5,000 in the case of the Cerasola Ranch and in the case of the other two ranches, there was a corresponding reduction—all reduced to around \$5,000.

Q. Did you make any effort to pay the purchase price after the reduction in the appraised value?

A. I did.

Q. What did you do?

A. I tried to get the money from the Federal Land Bank to pay it.

Q. Did you also make an effort to obtain Federal loans from various sources?

A. Yes, I did.

Q. Were you successful in securing any of those loans? A. No.

Q. Why not?

Mr. Craven: Objected to as calling for conclusion of the witness; immaterial and irrelevant.

The Court: If he knows I will permit it, subject to the objection.

(Question read)

A. Because they claimed I didn't have title.

Q. Were you finally successful in securing money to pay the balance of the purchase price?

(Testimony of Mr. W. J. Cerasola.)

A. I did. [68]

Q. When?

A. I believe it was in 1936.

Q. Did you make an offer of that balance of the purchase price to any government agent?

A. I did.

Q. Who was it?

A. Firth.

Q. Do you know what his capacity with the government was?

A. He was a man sent here from Washington.

Q. Do you know whether or not he is an officer in the Department of the Interior?

A. Yes.

Mr. Craven: May my objection go to all this testimony?

The Court: Yes.

Q. Did you offer the money to him?

A. He wanted me to assure him that I could get the money if the government wanted it and I did that.

Q. Where did you do that?

A. In the First National Bank in Reno, the main office, before the president of the bank.

Q. They were willing at that time to advance you the money to pay the balance of the price?

A. Yes.

Q. Did you thereafter advise Mr. Firth?

A. Yes.

Q. Are you willing and able at the present time to pay the balance of the purchase price?

A. Yes. [69]

(Testimony of Mr. W. J. Cerasola.)

Q. Are you familiar with the lands in the Indian Reservation, the Pyramid Lake Indian Reservation?
A. I am.

Q. Are there any portion of those lands, Mr. Cerasola, of the Reservation at the present time which are not being used by the Indians?

Mr. Craven: Objected to as immaterial.

Mr. Busey: If the Court please, in that respect this action is brought essentially for the benefit of the Indians. The Act itself provides that the purchase price goes to the Indians in the event the purchase is consummated; likewise, under the Wheeler-Howard Act, unless the Indians approve the sale and disposition of the property, the sale does not go thru; the entire proceeding is one for the benefit of the Indians and they are the persons actually here involved, and where that is the case there are Federal Court decisions to the effect that the status and interests of the Indians affected is always to be considered in construing laws relating to Indian lands. Now in this case the status of the Indians is decidedly affected, so that the situation down there, as far as the Indians are concerned, at the present time their interests in this matter is a matter which could be and should be properly allowed in the evidence in this case.

The Court: I will permit it, subject to the objection. Objection overruled.

Mr. Craven: Exception.

(Question read)

(Testimony of Mr. W. J. Cerasola.)

Q. What is your answer, Mr. *Depaoli*? [70]

A. I didn't answer.

Q. Are there any uncleared or undeveloped lands in the Indian Reservation at the present time?

A. Yes.

Q. Are they being used as ranch lands or not?

A. Yes, using them as pasture lands.

Q. Are those lands such that they could be cultivated if cleared and developed? A. Yes.

Mr. Craven: Same objection.

The Court: I will permit the answer to that. What was the answer?

A. Can be cultivated.

The Court: It may stand, subject to the objection at present.

Q. And the answer was they can be cultivated?

A. Yes.

Q. Would you estimate approximately how much of such lands there are in the Indian Reservation?

A. You mean of such land?

Q. Yes.

A. This particular piece of land I have reference to I imagine is around 500 to 600 acres and it is a river bottom and can be cleared and put in under cultivation just as easy as the land we have now.

Q. Are there other such pieces of land in the Indian Reservation?

A. There are some, yes; not probably as large as that one.

(Testimony of Mr. W. J. Cerasola.)

Q. Do those lands compare favorably with your land that you [71] have cultivated?

A. They adjoin it.

Q. They are the same type of land?

A. Yes.

Q. When your father died, Mr. Cerasola, how did you and your brother acquire the three ranches involved in the three cases here? Did you acquire that prior to his death? A. Yes.

Q. How? A. By a deed.

Q. He deeded the lands to you? A. Yes.

Q. So that you and your wife are the only heirs who have an interest in the Cerasola Ranch at the present time?

A. No, W. J. Cerasola and J. A. Cerasola.

Q. And your wife have an interest?

A. Yes.

Q. In the Cerasola Ranch? A. Yes.

Q. And in the Olinghouse Home Ranch and the Howell Ranch, do you alone have that?

A. Yes.

Q. You have the sole interest in that ranch?

A. Yes.

Q. The Hamilton Ranch and the Hill Ranch?

A. J. A. Cerasola.

Q. He has the sole interest in that?

A. Yes. [72]

Q. Who is P. J. Capurro, Mrs. W. Zecher and Mrs. A. Checchi? A. My sisters.

(Testimony of Mr. W. J. Cerasola.)

Q. Do they have any interest in any of these lands? A. No.

Mr. Busey: I think that is all.

Cross Examination

By Mr. Craven

Q. Mr. Cerasola, do you remember when you got the notice from the Land Office to pay the purchase price and interest within 30 days, the notice was addressed to Domenico Cerasola and you signed that for your father? A. Yes.

Q. You received that personally and your father was dead? A. Yes.

Q. And you received the notices in the other cases too, did you not?

A. Yes, all mail that came to my father I received it all.

Q. And in the case against you and your wife, case No. 2745, you also received that notice?

A. Yes.

Q. Mr. Cerasola, you received letters from Miss Bowler, demanding possession of the lands, did you, by registered letter?

A. I believe I received one. If there have been more, I don't recollect.

Redirect Examination

By Mr. Busey

Q. Mr. Cerasola, were there various extensions in time made to you with reference to the time within which you were to pay the principal and

(Testimony of Mr. W. J. Cerasola.)

interest on the purchase price of these three pieces of land? [73]

A. You mean was it a limited time?

Q. Were there any extensions of the various times in which you were to make payments?

A. Yes.

Q. There were several such? A. Yes.

Mr. Kearney: May I ask one question?

Q. (Mr. Kearney) Mr. Cerasola, during the depression, from say 1931, from that time for a number of years, what were the relative values of farm lands as compared with the value prior to that time?

Mr. Craven: We object; it is entirely immaterial.

Q. What was the relative value of farm land after the depression started, as compared with its value prior thereto?

Mr. Craven: Immaterial and irrelevant; has no bearing whatsoever upon the issues of this case.

The Court: I have serious doubt of its materiality or relevancy, but I will permit it if the witness knows.

Mr. Craven: Exception.

A. Prior to the depression more than half; a difference in value during the depression than before.

Q. During that period of time did you make any effort to have the government recognize that difference in the value of agricultural lands?

(Testimony of Mr. W. J. Cerasola.)

Mr. Craven: Same objection.

The Court: We went into that. There was an application for reduction he testified to.

Mr. Kearney: I missed that. [74]

Mr. Craven: I move the testimony of M. P. Depaoli and W. J. Cerasola, be stricken on the ground and for the reason it is incompetent, irrelevant, and immaterial to prove or disprove any of the issues in these cases.

The Court: For the present the motion to strike will be denied.

Mr. Craven: Exception.

The Court: Exception may be noted. You may ask that later. We will be in recess for 10 minutes.

(Recess taken at 2:45)

2:55 P. M.

Mr. Busey: If the Court please, the United States Attorney has made a stipulation in each of the three cases, concerning certain evidence, which evidence is set forth in the stipulation. The right of the United States Attorney to object to the materiality of this evidence and to make such other objections concerning the evidence as he wishes is reserved. I would like to offer each of those stipulations in evidence. The first is stipulation in case No. 2742. Does your Honor desire me to read these at this time? They simply go to the effect that for

(Testimony of Mr. W. J. Cerasola.)

a period of more than 75 years the land has been improved and occupied by the defendants in each of the three cases.

Mr. Boyle: By the defendants and their predecessors.

The Court: Well, you have stated what they are. That is sufficient.

Mr. Busey: We ask stipulation in case No. 2742 be marked——

Clerk: Defendants' 4. [75]

Mr. Busey: The one in case No. 2743 defendants' Exhibit——

Clerk: Defendants' 5.

Mr. Busey: And in case No. 2746 defendants' Exhibit 6.

Clerk: Defendants' 6.

Mr. Craven: Your Honor, I think it is expressly understood between counsel for the defendant in those three cases that those stipulations may be admitted subject, however, to the objection that the statements contained in the stipulation are entirely incompetent, irrelevant and immaterial.

Mr. Busey: That may be understood, your Honor. And also I would like to ask counsel whether or not he would stipulate that 120 acres of patented land in the Cerasola Ranch was land originally granted the State of Nevada in 1864, to be used by the State of Nevada for the purpose of raising school funds?

(Testimony of Mr. W. J. Cerasola.)

Mr. Craven: I will, your Honor, except that we save our objection that it is incompetent, irrelevant, and immaterial and under condition that it can be expressly understood that the lands in question were always lands of the United States.

Mr. Busey: Well, I will stipulate you may make any objections to the competency or materiality of that evidence as to the 120 acres of land and that the 120 acres of land is patented land and is in no way involved as such in this case.

The Court: Is this land within Sections 13 and 36?

Mr. Busey: I don't know exactly whether that is true in this instance or not. Some of those lands granted to the State for school revenue purposes were not within Sections 13 and 36.

Mr. Craven: I will stipulate that, if it is understood the lands in question in these 5 suits are not in any way involved [76] with any prior grants for school land purposes to the State.

Mr. Busey: We will stipulate to that.

Mr. Kearney: In that connection may I ask that it be stipulated that there are large areas of land within the outside boundaries of the Reservation that have been patented by the United States to the State of Nevada or to other corporations or individuals, notably the lands near Wadsworth and below Wadsworth and adjacent to the lands in question in the 5 suits.

(Testimony of Mr. W. J. Cerasola.)

Mr. Craven: I am not prepared to stipulate that Wadsworth is not in the Reservation.

Mr. Kearney: Oh yes, that is in the Reservation.

Mr. Craven: And you want to stipulate there are certain townsites——

Mr. Kearney: No, just patented areas.

Mr. Craven: Outside of Wadsworth?

Mr. Kearney: Yes, but within the outside boundaries of the Indian Reservation, that have been patented by the United States to the State of Nevada, and that those lands are adjacent to the lands in question in the 5 suits.

Mr. Craven: For instance the Gardella tract?

Mr. Kearney: Mr. Gardella had patented land aside from the land he purchased under these contracts. He has paid in full for his land—they have accepted his money. Then the Garaventa Land & Livestock Company has State patented land and the Lundell Ranch at Wadsworth, a portion is patented and then the 120 acres Mr. Busey has just called your attention to, within the confines of the Cerasola property, 160 acres patented land within the confines of the M. P. Depaoli property, and other patented lands. [77]

Mr. Craven: Would you mind stating the purpose of that?

Mr. Kearney: The purpose is this, that the lands that are involved in this particular proceed-

(Testimony of Mr. W. J. Cerasola.)

ing are a part of other lands which the government has patented within the Reservation, within the Indian Reservation, has parted with the title, and that the unpatented area which is involved in these applications or contracts is adjacent to the lands that they have actually patented.

Mr. Craven: For what purpose?

Mr. Kearney: The purpose to show that not all the land within the Reservation is government land.

Mr. Craven: That is the only purpose?

Mr. Kearney: Yes.

Mr. Craven: That is your purpose too?

Mr. Busey: With reference to what stipulation?

Mr. Craven: You want me to stipulate, as I understand, that there are certain tracts of patented land within the anterior boundaries of the Pyramid Lake Reservation, in your case particularly 120 acres?

Mr. Busey: Yes.

Mr. Craven: The only purpose is to show that there are certain patented areas of land within certain boundaries?

Mr. Busey: Yes, that is the purpose.

Mr. Craven: It being understood that this is the only purpose, we will stipulate in that respect.

Mr. Kearney: The stipulation you have as to the occupancy of 75 years, the facts in those stipulations apply to the other two suits as well?

Mr. Craven: Yes. [78]

(Testimony of Mr. W. J. Cerasola.)

Mr. Kearney: That is to M. D. Depaoli and the Garaventa Land & Livestock Company?

Mr. Craven: Yes.

Mr. Busey: That is all in the Cerasola case.

Mr. Craven: In regard to the stipulation, we stipulate that those are facts for the purpose mentioned, but reserve objections that they are incompetent, irrelevant, and immaterial.

Mr. Kearney: I understand that.

Case No. 2741

MR. GARAVENTA,

being first duly sworn, testified as follows:

Direct Examination

By Mr. Kearney

Q. What is your name please?

A. Joe Garaventa.

Q. What relation do you bear to the defendant, Garaventa Land & Livestock Company?

A. I am president.

Q. The original corporation consisted of whom?

A. My father and myself and brother.

Q. And your father is now deceased?

A. Yes.

Q. How long since? A. 1931.

Q. You are named as a defendant occupying

(Testimony of Mr. Garaventa.)

236.14 acres of land in Sections 4 and 9 of Township 20 N., Range 24 E., M. B. & M., that is correct, is it not? A. Yes.

Q. Those lands were applied for by you under a contract of pur- [79] chase under the Act of 1924, which is referred to in this case?

A. Yes sir.

Q. How much money did you pay down when you made that application? A. About \$1800.

Q. How much of that 236.14 acres is cultivated, approximately? A. About 65 acres.

Q. After 1930 did you make any effort to have the contract modified so as to have the price of the lands reduced? A. Yes.

Mr. Craven: We move that answer be stricken and object on the ground and for the reason it is incompetent, irrelevant, and immaterial.

The Court: For the present the objection will be overruled. It will be admitted subject to the objection.

Q. Pending that period of time, were extensions of time granted in which to make payments of interest and principal on the contract? A. Yes.

Mr. Craven: May it be understood the same objection goes to all this questioning?

The Court: Yes.

Q. In 1930 and up to the present time state whether or not your lands have been mortgaged?

A. Yes, they have been mortgaged.

Q. Where you able during that period of time

(Testimony of Mr. Garaventa.)

following 1930 to pay up in full upon the contract?

A. No.

Q. I understand you had applied for relief from the requirements [80] of the contract?

A. Yes.

Q. Now after you had learned that the contract would not be modified, did you receive any advice from the holder of the mortgage that the money would be forthcoming to pay the balance on the contract? A. Yes.

Q. And did you make an effort to pay that to the United States? A. Yes.

Q. With what result?

A. That it was cancelled.

Q. And you were not able to raise the money until after that notice of cancellation had been received? A. Yes.

Q. And then only thru the holder of the mortgage upon your property? A. Yes.

Q. Do you have other lands adjacent to and surrounding the particular lands in question?

A. Yes.

Q. Are those patented lands? A. Yes.

Q. On what lands are your improvements, the patented lands or the contract lands that are the subject of this suit?

A. The contract lands.

Q. So that in the event you are dispossessed—what are the improvements to your lands?

A. House and barns. [81]

(Testimony of Mr. Garaventa.)

Q. They are all on unpatented lands?

A. Yes.

Q. Are the patented lands irrigated?

A. Yes.

Q. And are the contract lands involved in this suit irrigated? A. Some of it.

Q. Approximately what did it cost per acre to subdue that, to get it in cultivation?

A. Well, some \$75, some \$100.

Q. Why did it cost such sums?

A. Part of it was sand dunes, had to be levelled and ditched.

Q. Did it take any considerable period of time to subdue that land?

A. Yes, a great deal of time.

Q. Over a long period of years? A. Yes.

Q. Is the land fenced? A. Yes.

Q. What would be the effect upon your farm as a unit if these lands were eliminated from the unit as an irrigated project?

Mr. Craven: Objected to on the same ground and the further ground it calls for conclusion of the witness.

The Court: The objection will be overruled. I will hear it subject to the objection.

Q. Did you get the question? (Question read.)

A. Well, it would interfere.

Q. Would it require the construction of a different system of ditches? [82] A. Yes.

(Testimony of Mr. Garaventa.)

Q. How is the land irrigated, by one ditch at the present time? A. By one ditch.

Q. And to whom does that ditch belong?

A. Well, it belongs to myself, Garaventa Land & Livestock Company, and Lundell estate.

Q. The two ranches are half owners each in that ditch? A. Half owners.

Q. You call that the Herman Ditch?

A. Herman Ditch.

Q. And the water right to all the land is owned individually by the Garaventa Land & Livestock Company? A. Yes.

Q. The Lundell land is patented land entirely, is it not? A. Yes.

Q. And that lies immediately east of your land?

A. Yes.

The Court: Let me inquire here—are those water rights involved in the Truckee River suit?

Mr. Kearney: Yes, your Honor. I propose, if the Court would not take judicial knowledge of that temporary restraining order, to ask the Clerk to testify concerning it, so it will be in evidence. I think that counsel will agree that may be taken into consideration by the Court.

Mr. Craven: We will, of course, subject to the objection, that it is incompetent, irrelevant, and immaterial.

The Court: That may be so understood. Reference may be made to it at any time if it is important. [83]

(Testimony of Mr. Garaventa.)

Q. At this time, Mr. Garaventa, is your company able, willing, and desirous of having the contract completed and payment made, so as to obtain the lands as part of your irrigation unit?

A. Yes.

Q. And has your mortgagee at the present time consented to the payment and holding the money available for you?

A. Yes.

Mr. Kearney: I think that is all.

Mr. Craven: No questions, We move to strike all questions of the witness on the ground and for the reason they are incompetent, irrelevant, and immaterial.

The Court: The motion at this time will be denied. We will hear argument later on it.

Mr. Kearney: At this time I desire to offer in evidence the copy of the temporary restraining order, approved by the Judge of this Court, in the case entitled, *United States vs. Orr Ditch Company, et al*, In Equity A, Docket No. 3, insofar as the decree pertains to the lands and water rights of the five defendants—my two defendants and your three joined in this suit—and I will furnish you a printed copy of that the same as I have this other printed form, if counsel prefer, or refer to the original on file in the Clerk's office here.

Mr. Craven: That is agreeable. We object to it

on the grounds it is incompetent, irrelevant and immaterial.

The Court: If it can be considered at all, we can refer to the records in the Clerk's office.

Mr. Kearney: May it be deemed as read in evidence, the original temporary restraining order and finding approved by the Court, [84] insofar as it relates to these particular defendants? This is United States against Orr Water Ditch Company. It is the temporary restraining order which was approved by the Court.

The Court: When was that restraining order issued?

Mr. Kearney: 1926. It is what they call the temporary decree.

The Court: Oh yes, that is the temporary decree.

Mr. Kearney: It was made in the form of a restraining order upon the Master's report that was filed by Judge Talbot and Judge Farrington, after arguments, adopted it as a restraining order, so as to give a three-year trial for distribution of water under it before further objections could be made.

The Court: It may be considered subject to the objection.

Mr. Kearney: That includes water rights of all these, including these rights for the Indian lands also.

Mr. Craven: Well, that certainly is remote.

The Court: We have a good many matters the Court is not certain what the law is.

Mr. Craven: We object to that being considered for any reason whatsoever, and particularly the last statement made by counsel, the water rights of the Indians.

Mr. Kearney: They found for the Indians.

Mr. Craven: Still objected to.

The Court: That is not based on the treaty of '59 is it?

Mr. Kearney: Yes, strange to say, Judge Talbot held different than the Circuit Court of Appeals held and after 70 years, looking backward, they measured the rights—limited them to actual cultivated area, which is 960, and in this finding gave [85] a waterright for 252 acres of land as of 1859, but under the decision of the Court of Appeals it will be reduced to 958, which is actually cultivated area for 76 years. In other words, the Circuit Court of Appeals has decided the question of introspection retrospectively, looking backward, not looking forward from '59, and they base it upon beneficial use rather than upon intended use, which is a new theory of water law, I must confess.

The Court: Is there any other evidence to be offered?

Mr. Kearney: That is all we have, your Honor.

The Court: Any rebuttal?

Mr. Craven: No, your Honor. We renew our motions to strike. We will state to the Court, however, if your Honor is going to consider any of this testimony that has been offered by the defendants, that we are ready and willing to prove,

in rebuttal that the lands in question are necessary for the use of the Piute Indian grounds. We submit that that affirmative evidence on behalf of the defendants is entirely immaterial, whether or not it is necessary. The fact remains, as a matter of law, that the entries have been cancelled.

The Court: Those matters can be considered after we hear arguments or briefs on the matter. If there is any reason for reopening of the case for further testimony on either side, the Court will consider it. I would like to hear from counsel now how they suggest the final submission of the case.

Mr. Craven: We submit that the law of this case as laid [86] down by your Honor on the motion to dismiss is determinative at this stage of the proceedings. The only issue involved, as I see it, is whether or not the Secretary of the Interior had authority and power to cancel the entries. We submit he did, the entries have been cancelled and the defendants, and each of them, now hold illegally and adversely to the government and proper writs for the restitution of those lands to the government should issue and your Honor, as I said, has already decided that issue.

Mr. Kearney: The Court in ruling on the motion, without giving any views, may decide the merits. It is my understanding in ruling on any particular question of law everything corresponds with the present District Court rules, which have recently gone into effect and were in effect with the Court ruled. These matters are all on the trial of the case.

Mr. Busey: There are several other new questions. We think the question of estoppels and laches were not raised on the hearing on motion to dismiss and also the question concerning the sufficiency for the various notices, so there are these issues, other than those presented on the motion to dismiss.

Mr. Craven: I will state to your Honor there is nothing further we can offer in the way of proofs, except perhaps a statement of the facts.

The Court: I was going to suggest along that line that the defendants assume the burden of opening brief and then the government reply in a reasonable time.

Mr. Craven: That is agreeable.

Mr. Kearney: There are two questions in this case that may be followed. I would like to have the government present the [87] theory they are going to stand on. I can see a serious question if they take one theory and if they take another theory. In other words, if the Court please, if this is a contractual obligation, there is ample authority by the Supreme Court of the United States that the government, as contractor, takes the same position as any other individual contractor to perform a service or executing any form of contract whatsoever and if they are going to put this on the basis of sovereign rights, it raises a different question and I do not believe we should be required to anticipate their theory of the case and that they should be required to set forth in a brief their theory of the case. The government may act in a sovereign capac-

ity and may act in a private capacity. Stress is laid on the Wheeler-Howard Act, to the effect that the Indians now have complete control of this land, that under the Wheeler-Howard Act Congress has surrendered the control of certain Indian lands and Indian Reservation, subject, however, to the tribal council. If that is their theory, we have an objection that may be rather serious on account of the original pleadings. In other words, the government can't have its pie and eat it too. They have either to sue in one capacity or the other and they have the choice of determining which form they will take; consequently, I would like counsel for the government to give their theory of the case upon which they sue, so we can meet that theory. They needn't write a lengthy brief but set forth the theory they stand on and then we can meet that particular theory with our theory. Otherwise we are obliged to cover the whole field and perhaps write an unnecessary long brief.

Mr. Craven: We submit our brief on defendants' Motion to [88] dismiss as our opening brief.

The Court: Then if counsel submits it that way, I will allow 30 days. The Court won't be in session, continuously at least, during the months of July and August; 30 and 30.

Mr. Busey: There is one further stipulation counsel has agreed to and that is that the patent issued to the 120 acres by the State of Nevada in the Cerasola Home Ranch was issued in the year 1866.

Mr. Boyle: That is the patent you have referred to?

Mr. Busey: The date of the patent, yes.

Mr. Boyle: What is it you want about that?

Mr. Busey: To stipulate the date of the patent to which Mr. Cerasola has already testified was the year 1866.

Mr. Craven: We agree, subject to the objection.

The Court: When was the Reservation established?

Mr. Busey: The year 1874. I don't think the Reservation was actually created by executive order or Act of Congress until 1874, when it was established by executive order.

(Court adjourned at 3:30 P. M.) [89]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I took verbatim shorthand notes of the proceedings had and the testimony adduced in cases Nos. 2741, 2742, 2743, 2744, and 2745, in which the United States of America is Plaintiff against various defendants, known as the Pyramid Lake land suits, at Carson City, Nevada, on Monday, the 19th day of June, 1939, and the foregoing pages, numbered 1 to 89 inclusive, comprise a full, true

and correct transcript of said proceedings and testimony, to the best of my knowledge and ability.

Dated at Carson City, Nevada, June 27, 1939.

MARIE D. McINTYRE,

Official Reporter.

[Endorsed]: Filed June 30, 1939. [90]

[Endorsed]: No. 9950. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Garaventa Land and Livestock Co., a corporation, Joe Garaventa, Louise Garaventa, his wife, Frank Garaventa and William Garaventa, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed October 14, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 9950.

UNITED STATES OF AMERICA,

Appellant,

vs.

GARAVENTA LAND AND LIVESTOCK CO.,

Appellee.

STATEMENT OF POINTS ON APPEAL.

Now comes the United States of America, appellant in the above-entitled case, and specifies the following statement of points to be relied upon on appeal:

1. The United States is entitled to recover the land within the Pyramid Lake Indian Reservation occupied by the defendant because title to the land is in the United States and the defendant has acquired no rights under the Act of June 7, 1924, or the regulations issued pursuant thereto.

2. The Secretary of the Interior had authority to cancel the application of the defendant for its failure to complete the payments on the purchase price.

3. The defendant has no right to possession of the land in suit.

4. The court erred in entering judgment dismissing the complaint.

NORMAN M. LITTELL,
Assistant Attorney General.
MILES N. PIKE,
United States Attorney.

Service of the above Statement of Points on Appeal, by copy, is admitted this 14th day of October, 1941.

W. M. KEARNEY,
DOUGLAS A. BUSEY,
Attorneys for Appellee.

[Endorsed]: Filed Oct. 15, 1941. Paul P. O'Brien,
Clerk. [91]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF THE
RECORD TO BE PRINTED.

The United States, appellant in the above-entitled case, designates for printing the entire record as certified by the Clerk of the District Court for the District of Nevada, omitting all exhibits other than the following which shall be included in the printed record:

Exhibit No. A

Exhibit No. B

Exhibit No. G (Only one of the five identical copies making up this exhibit need be printed.)

Exhibit No. H

Exhibit No. P

Exhibit No. T (Omit printing all papers except those concerning Garaventa Land and Livestock Co. distinguished by Serial No. 015163.)

Letter to Garaventa Land and Livestock Co. and return receipt signed by them, both contained in Exhibit No. U and distinguished by Serial No. 015163.

Exhibit No. V

Respectfully submitted,

NORMAN M. LITTELL,

Assistant Attorney General.

MILES N. PIKE,

United States Attorney.

Service of the above Designation of Portions of the Record to be Printed, by copy, is admitted this 14th day of October, 1941.

W. M. KEARNEY,

DOUGLAS A. BUSEY,

Attorneys for Appellee.

[Endorsed]: Filed Oct. 15, 1941. Paul P. O'Brien,
Clerk. [92]

No. 9950

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

GARAVENTA LAND AND LIVESTOCK CO. ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEVADA

BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General.

MILES N. PIKE,
*United States Attorney,
District of Nevada.*

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FILED

JAN - 9 1942

PAUL P. O'BRIEN,
CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9950

UNITED STATES OF AMERICA, APPELLANT

v.

GARAVENTA LAND AND LIVESTOCK CO. ET AL., APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEVADA*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 36-49) is reported in 38 F. Supp. 191. The judgment, the findings of fact, and the conclusions of law appear at pp. 35, 89-102, and 103, respectively.

JURISDICTION

This is an appeal from a final judgment entered on March 8, 1941 (R. 35). Notice of appeal was filed on June 7, 1941 (R. 58-59). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225a.

QUESTION PRESENTED

Whether the defendant did not lose all right to purchase land under the Act of June 7, 1924, c. 311, 43

Stat. 596, by failing to pay deferred installments of the purchase price within the time set by the Secretary of the Interior.

STATUTE INVOLVED

The material portions of the Act of June 7, 1924, c. 311, 43 Stat. 596, are summarized in the Statement, and are set forth in full in the Appendix, pp. 10-11, *infra*.

STATEMENT

This was an action by the United States to evict the defendant from land within the Pyramid Lake Indian Reservation in Nevada (R. 2-5). The essential facts are as follows:

The Act of June 7, 1924, 43 Stat. 596, authorized the Secretary of the Interior to sell to white settlers or their transferees, under such terms, conditions and price per acre as he might prescribe, the lands in the Pyramid Lake Indian Reservation which they had settled upon, occupied and improved for twenty-one years or more (sec. 1). It also required that all sales be by private cash entry, the proceeds to be deposited in the federal treasury subject to appropriations by Congress for the Piute Indians of the reservation (sec. 1); that all sales be made through the local land office within ninety days after the Secretary fixed the price of the land (sec. 4); and that the United States enter upon and take possession of the land for the use and benefit of the Piute Indians if entry were not made within that period (sec. 4).

In March 1925, after having approved a classification and appraisal of the land subject to sale, the Sec-

retary directed that settlers be allowed ninety days from February 7, 1925, the date of the approval and fixing of the prices, within which to pay the full purchase price at the local land office (R. 96, 135-156). He also gave instructions that the settlers be advised that if entry were not made within the time specified the United States would take possession of the land and all their claims to the land and improvements thereon would be forfeited (R. 155-156). However, in May 1925, the Secretary modified his earlier instructions and permitted the settlers to pay one-fourth down and the balance in three equal annual installments with interest on the deferred payments at five percent per annum (R. 96, 168).

In September, 1925, the General Land Office allowed an application to purchase which the defendant had filed in March, 1925, together with a down payment of \$1,853.92 on a total purchase price of \$7,395.70 (R. 96, 172-173). The defendant defaulted on the deferred payments, but the General Land Office refrained from cancelling its application because of existing economic conditions and the pendency of proposed legislation to reduce the purchase price (R. 96). In September, 1931, however, it directed that the defendant be allowed ninety days from notice within which to pay the full deferred balance and interest (R. 96.) In December, 1931, before that ninety-day period expired, the General Land Office notified the defendant that it was allowed until January 31, 1932, to pay one-third of the outstanding balance, and interest; and that, in case of default and in the absence of an appeal to the Secre-

tary, its application would be cancelled, the initial payment forfeited, and the case closed without further notice (R. 96-97). The defendant again defaulted, but no further action was taken on its application pending consideration of a Senate resolution which required the Department of the Interior to withhold further collections from settlers pending an inquiry by a Senate committee with respect to the existing appraisals (R. 97).

In May 1935, the General Land Office advised the defendant that the purchase price for the land it was seeking to purchase had been reduced from \$7,395.70 to \$4,005.70, thus leaving due and unpaid \$2,151.78 after credit given for the down payment of \$1,853.92; that it was allowed thirty days to pay the principal and interest in full or to pay the interest only; and that its application would be cancelled if such payment was not made or an appeal taken to the Secretary (R. 97).

The defendant appealed for a further reduction of the purchase price in the light of existing economic conditions (R. 98). In March 1936, the General Land Office notified it that the Secretary required that interest due and unpaid should be paid within thirty days; that one-third of the principal remaining to be paid should be paid within six months; and that, failing this, its application would be cancelled without further notice (R. 98). In May 1936, the Secretary ordered the defendant's application cancelled when it failed to pay the interest as required (R. 98).

The present action was instituted in February 1938 (R. 2-6). The complaint set forth that the defendant

had failed to complete the purchase of the land within the time allowed; that it had refused to vacate after written demand; and prayed for judgment of eviction. The defendant filed a motion to dismiss on the ground that the Secretary had no authority to cancel its application (R. 2-9) and this motion was denied (R. 10).

Thereafter the defendant filed answer (R. 11-21), in which it was alleged that ejectment could not be maintained because the Secretary had no power of cancellation; that the defendant had tendered full payment at the local land office, which was refused; and that it was ready, willing, and able to pay.

On March 8, 1941, the district court filed its opinion (R. 36-49). Applying section 4 of the Act of June 7, 1924, the court held the defendant's initial payment constituted a seasonable entry and that its default on the deferred payments did not present a condition which required the Government to enter upon and take possession of the land. It stated that "such drastic remedy" was not needed "to protect the interests of the United States in the sales agreement" (R. 48), and that (R. 48-49):

It is not the policy of the Government to enforce strictly the provisions of the land laws against settlers on the public domain where circumstances, like those occasioned during a period of depression, may make it difficult for such settlers to comply.

On the same day judgment for the defendant was entered in the minutes of the court (R. 35). The Government filed a motion for reconsideration of the opin-

ion and decision, which was denied (R. 51-52). It then filed this appeal (R. 58-59).

On application by the district judge, this Court remanded the case for entry of findings (R. 76-77). Thereafter, the district court entered its findings and conclusions (R. 89-103), holding (R. 103) that it would be inequitable and unjust to permit cancellation of the sales agreement.¹

SPECIFICATION OF ERRORS

The specification of errors (R. 284-285) may be summarized as follows: The defendant acquired no right to the land, having defaulted on the deferred payments. The district court, therefore, erred in failing to enter judgment in favor of the United States.

ARGUMENT

**Having defaulted on the deferred payments, the defendant
lost all right to the land**

The district court erred in holding that the defendant was entitled to retain possession of the land despite its failure to comply with the time limit set by the Secretary for payment of the purchase price. Under the Act of June 7, 1924, section 1, the Secretary was authorized to fix the terms and conditions of sale. In addition, he had ample power and authority to make

¹ There were twelve settlers who applied to purchase land under the Act of June 7, 1924. Of these, seven completed their payments and received patents, and five defaulted (R. 95). The present action and four similar actions were brought against the five in default. The four other cases are held in abeyance pending the result of this case (R. 40).

rules and regulations governing the sales agreement with the defendant, under the power and authority vested in him by general statutes to supervise and control the disposal of public lands. R. S. sec. 441, 5 U. S. C. sec. 485; R. S. sec. 453, 43 U. S. C. sec. 2; R. S. sec. 2478, 43 U. S. C. sec. 1201. Cf. *Cameron v. United States*, 252 U. S. 450, 459–463 (1920); *Michigan Land and Lumber Co. v. Rust*, 168 U. S. 589, 592–593 (1899); *Hawley v. Diller*, 178 U. S. 476, 488–489 (1897); *Standard Oil Co. of California v. United States*, 107 F. 2d 402, 409–414 (C. C. A. 9, 1939), certiorari denied, 309 U. S. 654, 673.

Pursuant to the authority thus held by him, the Secretary prescribed a time limit within which the defendant was to pay for the land or suffer cancellation of its purchase application (R. 98). This regulation had the force and effect of law. It was the same as if it were an incorporated part of the Act of June 7, 1924, or as if it were an independent enactment by Congress. The defendant was bound to comply with the time limit set by the Secretary or suffer the loss of all right to the land. *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 Fed. 4, 11–12 (C. C. A. 9, 1901), affirmed 190 U. S. 301 (1903); *Standard Oil Co. of California v. United States*, 107 F. 2d 402, 413 (C. C. A. 9, 1939), certiorari denied, 309 U. S. 654, 673. In this case the defendant failed to complete payment of the purchase price on time (R. 98), and the Secretary cancelled its application. It follows that the defendant has no right to the land and that the United States can recover possession.

The district court held (R. 48-49, 103) that the Government ought not to be able to maintain ejectment because of the defendant's default on the deferred payments. It said that the interests of the United States did not require such a remedy, and that it was contrary to governmental policy strictly to enforce the land laws in a case such as this (R. 48-49). But clearly such considerations were for the Secretary to determine. The Act of June 7, 1924, confided in him the sole and exclusive authority to determine what the interests and policy of the United States demanded under all the circumstances of the case. The record shows (R. 96-98) that he not only granted extensions to the defendant but also reduced the purchase price almost in half because of economic conditions, in order to assist the defendant. The record also shows (R. 98) that the Secretary gave further consideration to the question of the defendant's ability to pay when it appealed for an additional reduction in the purchase price, before he cancelled the application. Thus it can hardly be said that a judgment of eviction would be drastic.

The district court obviously was influenced by equitable considerations (R. 46-49, 103). But it must be remembered that this is not a case of a sales agreement between an ordinary vendor and vendee. The Government here seeks to enforce a public land law and the regulations of the Secretary thereunder. In such case general principles of equity cannot be applied to frustrate enforcement of the law or to thwart public policy. *Pan American Co. v. United States*, 273 U. S. 456, 505-509 (1927); *Utah Power & Light Co. v. United States*,

243 U. S. 389, 409 (1917); *Causey v. United States*,
 240 U. S. 399, 402 (1916); *Heckman v. United States*,
 224 U. S. 413, 446-447 (1912).

CONCLUSION

It is, therefore, submitted that the judgment should be reversed.

Respectfully,

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JANUARY 1942.

APPENDIX

The material portions of the Act of June 7, 1924, c. 311, 43 Stat. 596, are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Secretary of the Interior is hereby authorized to sell to settlers or their transferees, under such terms, conditions, and price per acre as the said Secretary may prescribe, any lands in the Pyramid Lake Indian Reservation, in the State of Nevada, that have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act: *Provided*, That no more than six hundred and forty acres shall be sold to any one person or corporation: *Provided further*, That said sales shall be by private cash entry after it has been shown to the satisfaction of the Secretary of the Interior that the lands applied for have been settled upon, occupied, and improved as required by this Act, and in addition to such price per acre as may be fixed by the Secretary of the Interior all entrymen hereunder shall pay the same fees and commissions as provided by law where public lands are disposed of at \$1.25 per acre. The proceeds of said sales shall be deposited in the Treasury of the United States and be subject to appropriations by Congress for the Piute Indians of the said Pyramid Lake Indian Reservation.

* * * * *

SEC. 4. All sales in accordance with section 1 of this Act shall be made through the local land

office within ninety days after the price of the land shall have been fixed by the Secretary of the Interior: *Provided*, That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation.

No. 9950

in the
United States Circuit Court of Appeals
for the
Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

vs.

GARAVENTA LAND & LIVESTOCK CO., a
Corporation, et al, Appellees.

Appeal from the District Court of the
United States, for the District of Nevada

BRIEF FOR APPELLEES

WILLIAM M. KEARNEY,
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FILED

FEB 21 1942

PAUL F. O'BRIEN,
CLERK

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UNITED STATES OF AMERICA, Appellant,
vs.
GARAVENTA LAND & LIVESTOCK CO., a
Corporation, et al, Appellees.

BRIEF FOR APPELLEES

APPELLEES' STATEMENT OF THE CASE

The United States of America has appealed from the final judgment entered in the above-entitled case by the District Court of the United States, for the District of Nevada. Final judgment was rendered, entered and docketed March 8, 1941 (R. 35). The written opinion was signed and filed on the same date (R. 36-49).

The notice of appeal was filed June 7, 1941 (R. 58-59).

Appellees are of the opinion that the statement of facts recited in appellant's statement appearing on pages 2 to 6 inclusive of its brief are correct insofar as they go, but say that all of the pertinent facts upon

which the District Court rendered findings and judgment are not included in the statement. Only so much as tend to support appellant's theory of the case are included. Appellees refer to and adopt the statement of facts which are succinctly set forth in the court's opinion and decision (R. 36-49) and also in the court's findings in fact (R. 89-103).

There was no motion for a new trial filed, but a motion to reconsider the opinion and decision was filed on April 2, 1941 (R. 51). An order denying the motion for reconsideration was entered in the minutes of the court June 2, 1941 (R. 52).

ARGUMENT

I. APPELLEES ACQUIRED RIGHTS IN THE LANDS IN QUESTION WHEN THEIR ENTRIES AND FIRST INSTALLMENT PAYMENTS WERE ACCEPTED.

The statement of points on appeal filed by appellant are limited to three specific points and a general one, viz., that the judgment dismissing the case was erroneous (R. 107-8).

a. The first point relied upon is that the defendant has acquired no rights under the Act of June 7, 1924.

The complaint herein (R. 2-5) alleges that defendant's (appellee, Garaventa Land & Livestock Co.) application to purchase the particular land was allowed and that Eighteen Hundred and Fifty-three Dollars and Ninety-two Cents (\$1853.92) was paid by said defend-

ant. The complaint is founded upon the theory of a contract of purchase and a cancellation for default in the payment of the balance of the installments.

The appellees acquired the right to the possession of the land under the particular Act of June 7, 1924, immediately upon the filing and approval of their applications to purchase. The applications of all of the parties involved in this appeal were accepted and approved and the first installment of one-fourth ($\frac{1}{4}$) of the purchase price was paid to the United States. (In the case of M. P. Depaoli the full amount was eventually paid and deposited in the U. S. Treasury.) (R. 238.)

The entry and occupation of the land under the Act of June 7, 1924, after the approval of the settler's applications and payment and acceptance of money established rights to the land in the settlers (appellees) which are questioned by Point No. 1 on the appeal.

In the case of *Orchard vs. Alexander*, 157 U. S. 372, 383-39 L. Ed. 737, 741, the Supreme Court said:

“The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed.”

See also *Carrol vs. Stafford*, 11 L. Ed. 671, 3 How. 441; *Witherspoon vs. Duncan*, 4 Wall 210, 18 L. Ed. 339.

The Act of June 7, 1924, under which appellant asserts the appellees have no rights, shows clearly that Congress recognized the equities of the appellees in

adopting the law, and that it is a special act for the relief of these settlers. The title of the Act reads:

“An Act for the relief of settlers and town-site occupants of certain lands in the Pyramid Lake Reservation, Nevada.”

The act is quite different from the Pre-emption, Homestead, Desert Land Act, Mineral Land laws, etc., in that it contemplates a sale on terms to the settlers to whom it was intended to grant relief. The act specified that the lands could be sold only to settlers or their transferees . . . who had settled upon, occupied and improved the lands in good faith for a period of twenty-one years or more immediately prior to the passage of the Act (R. 135-6, and see Appendix “B” attached hereto).

The only Rules and Regulations under which the entries were made were issued in a letter dated March 3, 1925, addressed to the Register and Receiver, Carson City, Nevada, by the Commissioner of the General Land Office and approved by E. C. Finney, First Assistant Secretary Interior (R. 135).

The rules and regulations provide, *inter alia*:

“You will transmit the application and affidavit to this office and will hold the money in your unearned account until action is taken on the application.” (R. 155).

The complaint admits the fact that applications were approved and that the money paid at the time of the filing of the applications was accepted by the government and deposited in the U. S. Treasury.

From the date of such acceptance of the applications

and purchase moneys the settlers held rights in the lands covered by their entries. The lands were no longer Indian Reservation lands, nor could they be otherwise disposed of or affected by other legislative grants or unauthorized rules.

Hastings & Dakota Railroad Co. vs. Whitney,
132 U. S. 357-363, 10 Sup. Ct. 112, 115, 33 L.
Ed. 363;

State vs. Mendez, 61 Pac. (2d) 300;

U. S. vs. Chicago M. & St. Paul Ry. Co. (C. C.),
148 Fed. 884-890;

Whitney vs. Taylor, 158 U. S. 85, 92, 95, 15 Sup.
Ct. 796; 39 L. Ed. 906;

Morrow vs. Warner Valley Stock Co., 101 Pac.
171-189.

The lands involved in the instant suits were clearly segregated from the Pyramid Lake Indian Reservation by Congress under the Act of June 7, 1924 (43 Stat. 596, C. 311), and the lands became subject to outright sale to qualified entrymen or purchasers. The qualifications of applicants for the land were set forth in the Act itself, viz.:

“That the lands applied for have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act.”

The complaint in the instant proceeding clearly shows that the applications and entries authorized by the Act of June 7, 1924, were accepted and approved by the Secretary of the Interior. The moneys paid thereon were deposited with the Treasury of the United

States. It will be noted that the settlers protested the appraisal price fixed by the United States but, in order to save the rights they claimed in the lands by virtue of their settlement upon the lands while unsurveyed in the early sixties, paid the money under protest so as to be further heard regarding the appraisal price of the lands. It was at that time contended that the improvements made by the settlers on the lands in the way of dams, ditches, clearing, levelling, cultivation, construction of fences, buildings, homes and other farming improvements, had not been taken into consideration by the appraisers appointed by the Secretary of the Interior to appraise the land (R.189-190-191). It will be noted that in the original application, applicant Garaventa Land & Livestock Company stated (R.190):

“The prices to be paid for the said land are governed by the notice of March 3, 1925, and local land office, dated May 1, 1925, under the same heading, or in the event any changes are made in the ruling of March 3, 1925, reducing the prices to be paid for the said land or the terms of payment the undersigned desires and requests the benefit thereof.”

On page 191 of the record, it appears as follows:

“United States Land Office at Carson City, Nevada.

“I Hereby Certify that the aforesaid lands as applied for above are subject to entry by the above named applicant at the price specified in notice of March 3, 1925, No. 1, 169, 548 ‘K’ MMJ.

CLARA M. CRISLOR, *Register*.

“Above described land not classified properly applicants reserve the right to file supplementing maps and classification.

“Price of land protected (*Should read “protested”*) and fee paid under protest.

“GARAVENTA LAND & LIVESTOCK CO.

“By FRANK N. GARAVENTA.”

The record will show that continuously thereafter until the filing of the instant suit the entrymen were seeking relief by way of a reduction of the appraisal price of the land through the Secretary of the Interior and through Congress. It was contended by the settlers that the appraisal price of the land was exorbitant and that the intention of Congress was to fix a price upon the land in its natural state rather than upon the value of the land as improved by the settlers. The recognized value, in fact the value fixed by Congress upon homestead lands similar to the lands entered by the settlers here involved, is \$1.25 per acre in their natural state. The settlers contended that the Secretary of Interior did not take into consideration or give effect to the equities of the settlers because the appraised values of the lands included the value of the improvements made by the settlers; thus in effect compelling the settlers to pay twice for the improvements, first, the initial cost of making the improvements, and, second, the value of the improvements after they were made. During the period when the settlers were attempting to have the appraised value of the land reconsidered, and after their applications had been approved and the first payment made on the purchase price, Congress passed an act on December 22, 1928 (45 Stat. 1069, C. 47, P. 1; 43 U. S. C. A. Sections 1068 and 1068A). See Appendix “A” attached hereto.

The said Act, among other things, authorizes the Secretary of the Interior to sell tracts of public lands not exceeding 160 acres that have been held in good faith and in peaceful, adverse possession by a citizen of the United States, his ancestors or grantors, for more than twenty years under claim or color of title, and where valuable improvements have been placed on such land, or some part thereof has been reduced to cultivation, at a price of not less than \$1.25 per acre.

Section 2 of the Act provides for an appraisal of such lands by the Secretary of Interior but it will be noted that

“said appraisal to be on the basis of the value of such lands at the date of appraisal, exclusive of any increased value resulting from the development or improvement of the lands by the applicant or his predecessors in interest, and in such appraisal the secretary shall consider and give full effect to the equities of any such applicant.”
(Italics ours.)

By the foregoing Act, Congress clearly recognized the equities of settlers who had in good faith entered upon lands of the United States and cultivated and improved the same.

The efforts of the appellees to have recognition given to the value of their improvements in making the appraisal upon their said lands was continued up to the date of the filing of this suit. It is contended by them that the Secretary of the Interior did not give full recognition to the Congressional intent, either in the Act of June 7, 1924, or 43 U.S.C.A. 1068-1068A.

Congress could not have spoken more clearly as to the equities of the settlers who are situated similarly to those here situated than it did by enacting Title 43 U. S. C. A., Sections 1068 and 1068A. It will be noted in the opinion and decision and the findings of fact of the District Court that the equities referred to in 43 U. S. C. A., Sections 1068 and 1068A, were given consideration by the District Court (R. 36-49 inc. and R. 89-103 inc.). Even the Commissioner of Indian Affairs concedes the equities of the defendant settlers. See the quotation contained in court's decision R. 45-56, wherein it is said:

“The white settlers have only such legal rights as were extended to them by the Act of June 7, 1924, but their equities are unquestioned and in view of all of the facts and circumstances of this case, not one of them may be charged with bad faith.”

The settlers still contend that their equities and rights by virtue of their settlements upon these lands and the improvements placed thereon should be considered by the courts before approving a forfeiture.

Neither the Commissioner of Indian Affairs, William Collier, nor Miss Alida Bowler, the Superintendent of the Pyramid Lake Indian Reservation, had legal authority over the lands in question to make demand upon the settlers to vacate (R. 225-230). From the foregoing authorities, it is apparent that the Act of June 7, 1924, served to effectively withdraw said lands in question from the confines of the Pyramid Lake Indian Reservation. It will be noted that Congress

took it upon itself to segregate these lands as it had the unquestioned authority to do and order the proceeds from the sale of these lands to be deposited in the Treasury of the United States.

It will be noted that the Act of June 7, 1924, provides only that the proceeds of the sales of said lands shall be subject to appropriations by Congress for the Piute Indians and that only when the entry is not made within the time specified in the Act is the United States authorized to enter upon the premises and take possession thereof for the use and benefit of the Indians. Section 4 of the Act states specifically:

“Provided that where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation.” (Italics ours.)

The entries here involved were all made within the time specified in the Act and were accepted by the Secretary of Interior and the initial moneys paid under protest as above stated. It is the contention of appellees that so long as the applications and entries of the settlers have been accepted and possession was continued on the lands up to the institution of this action in ejectment, that the Bureau of Indian Affairs was without authority to make demand for the possession of the lands. The lands continued to remain segregated from the Indian Reservation by the express terms of the Act of June 7, 1924.

b. The second point relied upon by the appellant is as follows:

“The Secretary of the Interior had authority to cancel the application of the defendant for its failure to complete the payments on the purchase price.”

The power of the Secretary of the Interior is limited by the terms of the Act of June 7, 1924. In the act itself, there is no express provision for the cancellation of the entries. The only authority given by Congress to have the lands restored to the possession of the United States for the use and benefit of the Indians is contained in Section 4 of the Act, which provision is quoted above. It is significant from the Act itself that Congress recognized a right of possession in the entrymen prior to the filing of their applications to purchase the lands under the terms of the act, otherwise the provision last above quoted from Section 4 of the Act would not require a re-entry and resuming of possession of the lands by the United States, except upon the hypothesis that the white settlers were already in possession prior to the entries under some equitable rights. Indeed, the Act prescribed as one of the qualifications for the purchase that the applicants must have settled upon the land in good faith and have continuously occupied and improved it for a period of twenty-one years prior to the passage of the Act. It may have been the intent of Congress in the passage of the Act of June 7, 1924, that the sales should be for spot cash and not in deferred payments. If it be held that the Act did not contemplate

a sale by partial payments, the Secretary of the Interior may have erred in his construction of the Act by authorizing the sales by partial cash payments instead of for spot cash. The only regulations authorized by the Secretary of the Interior with respect to the Act of June 7, 1924, were contained in a private letter dated March 3, 1925, addressed to the Register and Receiver, Carson City, Nevada, signed by William Spry, Commissioner, and approved on March 3, 1925, by E. C. Finney, First Assistant Secretary, which appears in the record, pages 135 to 156 inclusive. The full and complete rules and regulations of the Secretary of the Interior respecting the sales of said lands are contained in said letter. The only modification of the rules and regulations last above referred to appears to have been covered in a telegram approved by the Secretary of the Interior on May 1, 1925, to the Register and Receiver of the Land Office at Carson City to allow the payment of $\frac{1}{4}$ down and the balance in three equal annual installments on the deferred payments at the rate of 5%. This modification of the rules and regulations appears at pages 167-168 of the Record in a letter addressed to the Secretary of the Interior by the Commissioner of the General Land Office, which contains among other things the following:

“Regulations under the above Act were prepared in this office and approved by the First Assistant Secretary on March 3, 1925. The regulations allowed each claimant ninety days from the date of the approval of the classification and appraisal of the land within which to pay the appraised price in the District Land Office. The regulations were

modified by telegram approved by the Secretary on May 1, 1925, to allow the payment of $\frac{1}{4}$ down and the balance in three equal annual installments with interest on the deferred payments at the rate of 5%."

It is significant that in the foregoing rules, regulations and instructions, the letter approved by the Assistant Secretary of Interior states (R. 155-6):

"You will advise the settlers on the lands listed of their *rights* under said Act of June 7, 1924, and that if entry is not made within the time specified, the United States Government will take possession of the land for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation and all claims which they may have had thereto by reason of settlement, occupancy and improvements thereon will be forfeited." (*Italics ours.*)

It is evident that the Secretary of the Interior regarded the lands as segregated from the Indian Reservation immediately upon the approval of the application and entry within the ninety-day period specified in the Act and in his regulations thereunder, to which we have last referred. Neither the Act nor the regulations and instructions of the Secretary contemplated any cancellation of the contract to purchase. Inasmuch as the Act of Congress made no provision for cancellation of these entries and apparently did not contemplate any such cancellation, no power vested in the Secretary of the Interior to cancel the entries after the approval of the applications and the segregation of the lands from the Indian Reservation and from all other forms of entry. He had no power to forfeit the equities of the settlers including the moneys paid on the purchase price, except through a resort to a court

of equity as shown by the authorities hereinafter set forth.

c. The third point relied upon by appellant in its statement of points on appeal is as follows:

“The defendant has no right to possession of the land in suit.”

From what appears in the foregoing portions of this brief, it will be seen that by the Act of June 7, 1924, Congress recognized the right of possession and equities of the settlers in the lands in suit. As we have heretofore stated, the Act limits the qualifications of the applicants to purchase the lands to settlers who have in good faith settled upon the land and who have occupied the same for a continuous period of twenty-one years prior to the adoption of the Act and have made improvements thereon. We have also pointed out hereinabove that not only by the Act of Congress of June 7, 1924, but also by the only rules and regulations adopted by the Secretary of the Interior with reference to said purchases that the right to the possession of the land by the settlers was recognized because of their settlements at a time when the lands were unsurveyed and the same were vacant and unoccupied and that such occupancy in good faith continued for a period of sixty-three years prior to June 7, 1924. The approval of the applications of the appellees in the form in which the same exists constituted a contract between the government and the applicants (appellees herein) under which equities arose which could not be arbitrarily defeated by the Secretary of

the Interior but only through the process of a suit in equity whereby the appellees could have a judicial determination of their equities as in any private contract. As will hereinafter be shown, when the United States enters into a contract with an individual, the United States then must resort to the same methods of enforcement as contracts between individuals are enforced.

The appellees lawfully settled upon these lands while the same were unsurveyed and unoccupied (District Court Findings, R. 89-93) and by virtue of the approval of their applications to purchase the land under the Act of June 7, 1924, they continued in lawful possession and occupancy of the respective tracts of land in suit. Having thus been lawfully in possession and occupancy of the lands under a contract of purchase, aside from the equitable rights recognized by Congress in the Act of June 7, 1924, and in the Act set out in 43 U. S. C. A., Sections 1068 and 1068A, it cannot be said that there is any merit to the point that the appellees have no right to the possession of the land in suit.

SECRETARY'S POWER IS LIMITED BY TERMS OF THE ACT OF JUNE 7, 1924

The 1924 act is a specific act controlling the powers of the Secretary of the Interior with reference to the particular lands involved herein. Wherein it varies from the general law it must be held to control. We have elsewhere pointed out that by necessary construc-

tion the Secretary has the power to provide for a sale by cash entry; that he is authorized to sell on terms and conditions; and that the initial part payment constitutes the entry and the sale. As we have shown, the only power in the Secretary under the 1924 act to enter and take possession is in the event that the "entry" is not made in ninety days. Here the entry was made within that time. The sale was consummated and the entryman became vested with the rights of the purchaser. The appellant, without pointing to any specific statutory authority so stating, claims that the Secretary has ample power to enter on the lands and take possession after the entry has been made in the event there is a default. The terms of the 1924 act give this power only when the entry is not made. Power is given to the Commissioner of the General Land Office under the direction of the Secretary of the Interior to carry into execution the provisions of the law on public lands (43 U.S.C.A. 1201). This is a general power and is limited by the terms of specific statutes.

Section 1201, cited by appellant, page 7, does not purport by its terms to do more than provide that the Commissioner under the Secretary's direction, shall carry the law into effect. So also, 5 U.S.C.A. 485, cited by appellant, page 7, merely states that the Secretary of the Interior is charged with the supervision of the public business relating to, among other things, public lands. Neither of these sections purports to do more than give authority to the proper agency

to carry the laws into effect. The general section on sales of public lands (43 U. S. C.A. 677) provides that credit shall not be given on such sales. We know that under the 1924 Act credit may be given for the balance of the price. Even if it should be argued that under the law the Secretary had no authority to sell the land on credit, this would be of no aid to appellant. A cash entry was actually made in the instant case and a sale effected. The Secretary would certainly have no authority to cancel the entry for non-payment of the balance of the purchase price if he had no authority to make any provision for unpaid balances in the first place. It seems clear that there cannot from the general statutes be implied a power in the Secretary to cancel for a late payment of a portion due on the balance of the purchase price. There is no provision for credit or payment of balances under the general public land law. Under such law and for such sales the Secretary is without power to arrange for such payments. There never could be an instance under the general statutes where an entryman would owe a balance on land on which he had entered.

43 U. S. C.A. 677, above referred to, prohibiting credit sales, has been the law since the Act of April 24, 1820 (3 Stats. 566), or since 1821. Prior to 1820 credit sales were permitted of public lands under the then existing statutes. It is to be noted that each of these statutes (repealed by the 1820 Act) contained an express provision that unless the unpaid credit balance was paid within the time specified, the land

sold could be forfeited to the United States (e.g., Act May 18, 1796, 1 Stat. 464, Section 7; Act May 10, 1800, 2 Stat. 73, Section 6). The 1924 act contains no such express forfeiture provision, nor can any be implied for the reasons stated. See *Lessee of Joseph Creps v. David Wilkinson*, 9 Ohio 200.

The fact is that Congress failed to make appropriate provisions for forfeiture by the Secretary of the Interior of the title to the land upon which entry was made. The provision for entry and possession by the Secretary if no entry is made is not applicable and there is no other provision in the 1924 Act. The general laws are not the source of the Secretary's claimed power. There is no express provision therefor and none can be implied, the Secretary having no power under the general laws as to credit sales.

Upon the making of the sale in the instant case an equitable conversion was effected. The interest of the appellant thereafter in the lands was that of an interest in personalty. The proceeds of the sale, according to the 1924 Act, are to be deposited in the Treasury and are subject to appropriations by Congress for the Piute Indians. Although deemed by the district court herein as unnecessary for the decision, it should be noted that as stated in the decision itself, the equities of appellees are unquestioned.

As pointed out in the district court's decision (R. 48) default or defaults in deferred payments "would not require such drastic remedy to fully protect the interests of the United States in the sale agreement."

The appellant has attempted to read into the law a non-existent provision for forfeiture above and beyond such rights as it may have or have had by reason of the delay in payments. If the appellant seeks a forfeiture it cannot claim it by virtue of the statutes or by the terms of the agreement. It must come into a court of equity which has always had jurisdiction of forfeitures. There has been no such suit instituted. It is to be noted that although part payment has been made and received there has been no tender or offer by appellant to return this sum.

We have already referred to appellant's contention that the general law gives the Secretary authority to do the acts attempted herein.

Together with the sections above referred to, appellant cites (p.7) *Standard Oil Co. of California vs. United States*, 107 F. (2d) 402. The case is of interest in that it discusses the powers of the Secretary, particularly under the sections cited. The case itself is of little relevance here. It holds that where the United States grants public lands to a state, reserving those known to be mineral, the decision of the Secretary that certain lands were known to be mineral is a proper exercise of his authority to administer the grant. As the court points out, the problem in the case was "not what authority Congress may confer upon the Secretary, but what authority it has conferred in relation to the administration of this grant." The court reviews the law and points out that the administration requires the decision between adverse claimants and the state

and must determine facts upon which the rights of the state depend as to certain sections of land. The court concludes:

“To the Secretary is delegated in all such matters the authority of deciding as a fact whether a particular section or any part of it falls within the grant or within an exception.”

The situation might be analogous to the instant case if the question involved were whether as a fact the appellees had not been settlers on the land for twenty-one years. The question in the cited case was whether the specific land was subject to the grant.

In the instant case the problem is not analogous. The Secretary's authority to administer the public land laws is not questioned; nor is his authority to administer the law under the Act of 1924; nor do we question the authority specifically given him to sell the particular land in question. What we do say is that it is not part of his authority to cancel the sale and entry under the general grant of authority to him nor under the 1924 act after a valid sale was made and entry and possession taken under the contract by the entrymen.

Together with the Standard Oil case, appellant cites *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 42 L. Ed. 591. The case merely held that the Land Department had power to determine whether certain lands were in fact swamp lands. The title in the state was inchoate until this was finally done. The swamp lands had been granted to the state. The opinion points

to and relies on the specific statutory authority given to the Secretary of the Interior to make the plats of the land and the statute which set forth a standard of classification to be followed. The court also relies on certain actions of the state. The court comments that where the granting act specifically provides for the issue of the patent, the legal title remains in the government prior to its issue. The court continues (168 U. S. 593):

“It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title.”

The case of *Hawley v. Diller*, 178 U. S. 476, 44 L. Ed. 1157, cited by appellant (page 7), was a suit in equity to quiet title and remove a cloud on the basis that the entry in question on the public lands was made by fraud. The act provided only for entry by one in good faith for his own benefit and not for speculation, and set forth that effect to the provisions of the act should be given by regulations of the Commissioner of the General Land Office. On proof of the fraud the Land Department declared the entry void. This it had power to do under the express provisions that an entry might be made and patent issued only where it was in good faith, etc. As the court states, the department had authority

“to inquire whether the original entry was in conformity with the act of Congress. . . . Of course, that department could not arbitrarily destroy the equitable title acquired by the entryman, and held by him or his assignee.”

The court also states that redress can always be had in the courts when the officers of the Land Department have held from a pre-emptioner his rights, when they have misconstrued the law, or when any fraud or deception was practiced which affected their decision.

See *Hawley vs. Diller*, 178 U. S. 476, 490-493; 44 L. Ed. 1157, 1162, 1163;

Sanford vs. Sanford, 139 U. S. 642-647; 35 L. Ed. 290, 291, 11 Sup. Ct. Rep. 666.

In the instant case the entry was made pursuant to and in conformity to the Act of 1924. There is no prerequisite to its validity lacking as was the situation in the Hawley case. For example, we are not concerned with what the Secretary's power to cancel would have been if appellees had failed to come within the class to which the benefits of the act were extended if, say, they were not in fact settlers who had settled on the land for twenty-one years prior to the act, or if they had practiced fraud in their sales agreement. It was that sort of thing which was involved in the cases cited by appellant and which is completely non-existent in the instant case.

At page 7 of its brief appellant cites *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301. That case sustained a demurrer to and dismissed a bill to enjoin interference with the possession of public land selected by the claimant in lieu of land relinquished in a forest reservation. The suit was brought at a time when there was pending before the Land Department a controversy between claimants. The court points

out that the claimant's right to the land had never been determined or accepted as a fact by the proper officials of the Land Department. The local officers had no authority under the law to determine if the selector were qualified and if the terms of the statute had been complied with. A contest as to that fact was presented to the land Department. The court held that under such circumstances the court was not justified in settling the question of whether the claimant had ever made a proper selection. The lack of relevance of this case is apparent. The court merely held that it would not determine the claimant's title as against a protestant when the determination of the claimant's initial right remained pending and undetermined before the Land Department. The claimant's assertion of an equitable title was shown to be at that stage no more than that claimant had done certain things and that the local office had certified that the land in question was open to settlement as far as the local books showed. There had not been the action by the proper officials such as would give an undisputed basis to his claim.

CONGRESS DID NOT AUTHORIZE THE CANCELLATION OF DEFENDANT'S ENTRY OR CONTRACTS OF PURCHASE AS IN THE CASE OF HOMESTEADS, DESERT LAND ENTRIES AND SIMILAR PUBLIC LAND ACTS

The Homestead Act (Section 2297, U. S. Revised Statutes) expressly provides for the cancellation of homestead entries. The section reads:

“If, at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land-office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government; Provided, That where there may be climatic reasons the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe.”

Congress likewise provided for a cancellation and forfeiture of lands entered under the Desert Land Act. Section 5 of the act of March 3, 1891, 26 Stats. 1096, provides among other things:

“If any party who has made such application shall fail during any year to file the testimony aforesaid (the proof of improvements, cultivation, map, etc.), the lands shall revert to the United States and the 25c advance payment shall be forfeited to the United States and the entry shall be cancelled.”

Without extending the illustration beyond the two foregoing instances, it is clearly shown that the Sec-

retary of the Interior was not authorized by Congress to cancel these contracts of sale. The remedy appears to be the enforcement of the payment of the purchase price. If Congress intended that the contracts of sale should be cancelled after they had been entered into, certainly they would have provided, as they did in the Homestead and Desert Land Acts, for authority to cancel and a reversion of the land to the United States.

The defendants (appellees) cannot be ejected because ejectment depends upon the right of possession when the action is commenced, and the plaintiff did not have such immediate right.

Hutchison vs. Coonley, 70 N. E. 686;
Schoolfield vs. Rhodes, 82 Fed. 153; 27 C. C. A. 95;
Smith vs. McCann, 16 Law Ed. 714;
Coles vs. Meskimen, 85 Pac. 67;
Goldsmith vs. Smith, 21 Fed. 611.

The Secretary of the Interior and similar officers cannot arbitrarily adopt rules in excess of the express authority given by an act of Congress. The rules and regulations adopted must be authorized by the act of Congress under which the same are promulgated and any rule or regulation purporting to assume or take power in excess of the statute is void.

Morrill vs. Jones, 106 U. S. 466;
Campbell vs. U. S., 107 U. S. 407; 27 Law Ed. 592;
Williamson vs. U. S., 207 U. S. 425; 52 Law Ed. 278;
Meads vs. U. S., 81 Fed. 684.

It was thus held that the requirements of Section 1640, Title 43, U. S. C. A., as to proof by homestead entrymen of cultivation and residence by two credible witnesses could not be enlarged by rules and regulations.

U. S. vs. George, 228 U. S. 14, 57 Law Ed. 712.

In the last cited case, the court said in construing what is now Section 22 of Title 5, U. S. C. A. and Sections 2 and 1201 of Title 43 U. S. C. A., that the statutes confer administrative power only and legislative power cannot be exercised under the guise of regulation.

The property of the United States cannot be disposed of except in the manner provided by law and no public officer or department without express authority from Congress has the right to dispose of government property.

Lear vs. U. S., 50 Fed. 65;

Flores vs. U. S., 18 Court of Claims 352.

CONTRACTS BETWEEN THE UNITED STATES AND ITS CITIZENS ARE GOVERNED BY THE SAME GENERAL RULES AS APPLY IN CASE OF CONTRACTS BETWEEN THE INDIVIDUALS

It is the rule that when the United States comes into court, it does so under the same general rules as any other suitor.

Folk vs. U. S., 233 Fed. 177-191 (C. C. A. 8, 1916);
State vs. Towessnute, 154 Pac. 805;
U. S. vs. Arredondo, 31 U. S. 691, 8 Law Ed. 547;
Brent vs. Bank of Washington, 10 Peters 596; 9 Law Ed. 547;
Reading Steel Casing Co. vs. U. S., 268 U. S. 186; 68 Law. Ed. 907;
Cory Bros. Inc. vs. U. S., 51 Fed. (2) 1010;
U. S. vs. American Sales Corp., 27 Fed. (2) 389; 74 Law Ed. 625;
U. S. vs. Oklahoma Gas & Electric Company, 291 Fed. 575;
U. S. vs. Bostwick, 94 U. S. 53; 24 Law Ed. 65.

By the terms of the act of June 7, 1924, the Secretary was given the power to sell the lands in suit to a particular class of settlers and that power is not questioned. The Secretary did enter into a contract for the sale of said lands on credit payments and the transaction is so construed in the plaintiff's complaint. The United States having entered into a contract under the express authority of Congress is required to follow the requirements of the Congressional Act. Once the Government has entered into a contract, it is bound thereby.

Missouri Pacific Railroad Company vs. U. S., 63 Court of Claims 341;
Bush vs. U. S., 52 Court of Claims 199;
Sutton vs. U. S., 256 U. S. 575; 65 Law Ed. 1099.

THE CONDUCT OF THE DEPARTMENT OF THE INTERIOR WITH REFERENCE TO THESE LANDS AND ITS VARIOUS REPORTS TO THE SECRETARY OF THE INTERIOR AND TO THE CONGRESSIONAL COMMITTEES JUSTIFIED THE SETTLERS IN BELIEVING THAT CONGRESS WOULD GRANT THEM RELIEF

It is a familiar rule of contracts that where one party has been led to believe by the conduct of the other that a delay in the performance will not subject the contract to cancellation, he is justified in relying thereon. There is in the record in this case, a transcript of the hearings before the Committee on Indian Affairs of the United States Senate, 75th Congress, First Session, Senate Bill 840. It will be found that in the letter already referred to in this brief dated December 19, 1921, page 15 of the pamphlet, the appraisement values of the land made by three persons selected by the Secretary of the Interior, were deemed excessive and that a recommendation was made by new appraisers that the land values be reduced so as to give the settlers some of the benefits of their work and labor in improving the land and in the construction of improvements.

It is also recognized that the white settlers were actually on the land long prior to March 23, 1874, the date of the Executive Order creating the Indian Reservation and in good faith, believing that they had a right to occupy the lands because the adjacent lands had been selected by the state and by the railroad

company and patents were theretofore or thereafter issued, even though such land was situated within the exterior boundaries of the reservation, delineated by map but not marked on the ground. It will also be noted that while the settlers were attempting to obtain more favorable terms from Congress that no action was taken upon contracts made pursuant to the Act of June 7, 1924. Then came the Act of December 28, 1928—43 U. S. C. A. 1068 and 1068A. This, naturally, led the settlers to believe that they would ultimately receive favorable consideration while the matter was pending. It is recognized by everyone familiar with the situation that the equities of these white settlers are real.

There is no question that forfeitures are not favored and that they may be waived expressly or impliedly:

“If a contract includes provisions which, if not complied with, involves a forfeiture, and the party for whose benefit the provision is inserted, knowing the other party is not complying with them, makes no objection and acquiesces therein, he waives the forfeiture.”

Hearsh vs. German Fire Ins. Co., 110 S. W. 23 (Mo.).

The courts are extremely reluctant to declare forfeiture and, as stated in *New York Life Ins. Co. vs. Eggleston*, 24 Law Ed. 841:

“Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture.”

Mr. Justice Brewer stated in the case of *Tarpey vs.*

Madsen, 178 U. S. 215-220, 20 Sup. Ct. 849-850, 44 L. E. 1042, in referring to the rights of the settler:

“And in this respect we must notice the oft-repeated declaration of this court that ‘the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon.’

Ard vs. Brandon, 156 U. S. 537, 543, 15 Sup. Ct. 406, 39 L. Ed. 524;

Northern Pac. Railroad vs. Amacker, 175 U. S. 564, 567, 20 Sup. Ct. 236, 44 L. Ed. 274.

“With this declaration, in all its fullness, we heartily concur, and have no desire to limit it in any respect; and if Olney, the original entryman, was pressing his claims, every intendment should be in his favor, in order to perfect the title which he was seeking to acquire.”

**ALTHOUGH THE UNITED STATES SEEKS TO
CANCEL AND FORFEIT THE APPELLEES'
INTERESTS IN THE LAND AND IMPROVE-
MENTS, IT HAS NOT RETURNED OR OF-
FERED TO RETURN TO THE SETTLERS
THE MONEY ALREADY PAID BY THEM OR
EXPENDED FOR IMPROVEMENTS**

On May 8, 1925, when the appellees filed their applications for the purchase of the lands in suit, each of them paid in cash one-fourth of the appraisal price conformable with the regulations and telegram approved by the Secretary of Interior May 1, 1925, to the Register at Carson City.

If the United States prevails in this action it means the appellees will suffer a forfeiture of the money paid as well as a forfeiture of the value of the improvements on the land.

Where no fraud is charged or claimed by the United States, the money paid must be tendered and returned if a forfeiture is sought.

U. S. vs. White, 17 Fed. 561;

U. S. vs. Budd, 43 Fed. 630;

U. S. vs. Budd, 144 U. S. 154, 36 L. Ed. 384;

People vs. Bryan, 14 Pac. 893 (Cal.);

People vs. Morris, 19 Pac. 378 (Cal.).

In *People vs. Bryan*, supra, the court distinguishes the case of *U. S. vs. Minor*, 114 U. S. 238, by stating that in the Minor case the patent was cancelled for actual fraud.

We are aware of other cases holding that where the property was obtained by fraud the equity rule requiring the tender and return of the money paid does not apply. However, in the instant case the applications and sales were all lawfully made; and plaintiff does not contend otherwise.

In *U. S. vs. Budd*, 43 Fed. 630 (supra) the court said:

“In considering the merits of the first of the several grounds for canceling the patent, it is important to keep in mind that this is not like a proceeding to rescind a contract. *The government has not offered to return the money it received for the land; and, while it seeks to be restored to its original title and possession, it does not pray to have the parties on both sides placed in the position which they occupied before its officers and agents granted Budd’s application to enter the land under this statute, and accepted the money. The case is prosecuted to secure an absolute forfeiture of all the defendants’ interests in the land, as well as the money paid for it, and proceeded under the theory that whatever is illegal and wrong in the transaction is chargeable solely to the defendants.* Now, if all that is claimed by the government as constituting the first ground for canceling the patent, both as matter of fact and of law, were conceded, the court would be unable to find any such fraud intended, or misconduct on the part of the defendants, as would afford either legal or equitable cause for the confiscation of their property. At most it is only claimed that this particular land, by reason of having been once offered at public sale, is excluded from sale under the Act of June 3, 1878. If this is so, the sale of it to Budd under that statute was an error, but only an error, and one for which the officers and agents of the government are chiefly responsible; for upon them is cast the duty of administering the law according to its provisions, and of holding all persons seeking to obtain title to lands from the government

to a compliance with the laws and regulations prescribed for the determination of their rights. When the government of the United States seeks relief from a court of equity, it is as much bounden as any individual suitor by the rules of equity; it can obtain such relief only when entitled to it upon principles of equity and good conscience. *U. S. vs. White*, 17 Fed. Rep. 273, 8 Sup. Ct. Rep. 850. *It cannot, to correct a mere error in a transaction not tainted with crime and fraud, perpetrate so grave a wrong on its part as to deprive its adversary of valuable property or a sum of money without any compensation or equivalent therefor. If this were a suit between two private individuals the plaintiff would not be equitably entitled to a rescission of his contract and restoration of his title to the land without first on his part repaying the purchase money which he had received; and by the same rules of equity and justice the right to the government to recover this land, and also to hold the purchase money paid for it, must be denied, unless a forfeiture of the defendant's rights on the ground of fraud or willful misconduct can be shown."* (Italics ours.)

LANDS OF APPELLEE, M. P. DEPAOLI

It will be noted in the record that five cases were consolidated for the purpose of trial (R. 120-121). See also opinion and decision of the court (R. 40).

It is desired to point out certain testimony with reference to the entry of M. P. Depaoli, who paid the full purchase price for his lands, the money being accepted by the Register and Receiver and deposited in the United States Treasury. After the commencement of these cases, the money paid by Mr. Depaoli was tendered back to him but he refused to accept the same and the money is still held by the United States.

The testimony of Mr. M. P. Depaoli concerning the payment of the purchase price in full appears in the record at pages 234 to 241 inclusive.

At page 238 of the Record, the following appears:

“Q. Have you made any payment to the Land Office at Carson City for this land under the entry that you made in 1925?

A. Yes, I did.

Q. To whom did you pay the money?

A. The United States Land Office, Carson City.

Q. Did you obtain a receipt for it?

A. Yes, sir.

Q. Up to the time until after this suit had been filed, did you receive any money that had ever been tendered back to you.

A. No.

Q. Did you recently, just a few days ago, or a few weeks ago, receive a letter tendering this money back to you?

A. Not the money I paid in 1925.

Q. I mean the full payment under your contract.

A. Yes.

Q. What did you do with the check that came?

A. Returned it to its original source.”

* * * * *

At page 239 of the Record:

“Q. How much money did you pay into the Land Office under your contract of purchase, the final payment?

A. \$5,116.62, something like that; I don't know.”
It will also appear from the Record (pages 239-240)

that the United States held the money until April, 1939, after the filing of this suit and tendered back to Mr. Depaoli a government check for \$5,116.62, which Mr. Depaoli promptly returned to the United States. In the foregoing respect, the case of Mr. Depaoli differs somewhat from the other four cases in that the plaintiff refused to accept the moneys tendered by the other settlers whose lands are involved in the suits in question on the grounds that the entries had been cancelled when the offer was made. The Government relies upon its cancellation and refuses to accept the balance of the purchase price.

CONCLUSION

In view of the fact that Congress, as well as the Department of the Interior, has recognized the equities of settlers and their continuous effort to perfect the titles to the lands involved in the suit in question, it is respectfully submitted that the entries should not be cancelled and the settlers ejected from the premises, thereby working a forfeiture of the moneys already paid by them as well as the moneys expended by them and their ancestors in the development of the lands from a raw state and in the construction of homes and other improvements.

Under the terms of the Act of June 7, 1924, it would seem that the interest of the United States can be protected by a suit to recover the balance of the moneys due but even that is unnecessary in that the appellees stand ready and willing at this time to pay the bal-

ance of the purchase price, notwithstanding they feel that the Secretary of the Interior has erred in refusing to recognize their equities resulting from the value of their improvements on the lands and has included the value of the improvements in the appraisal figures. It will be particularly noted in conclusion that the moneys already paid by the appellees far exceed the value placed upon similar lands by the United States in disposing of lands to settlers.

Dated: February 18, 1942.

Respectfully submitted,

WILLIAM M. KEARNEY,

DOUGLAS A. BUSEY,

ROBERT TAYLOR ADAMS,

Attorneys for Appellees.

APPENDIX A

CHAPTER 25A.—*Lands Held Under Color of Title*
(New)

1068. LANDS HELD IN ADVERSE POSSESSION; ISSUANCE OF PATENT; RESERVATION OF MINERALS; CONFLICTING CLAIMS. Whenever it shall be shown to the satisfaction of the Secretary of the Interior that a tract of public land, not exceeding one hundred and sixty acres, has been held in good faith and in peaceful, adverse, possession by a citizen of the United States, his ancestors or grantors, for more than twenty years under claim or color of title, and that valuable improvements have been placed on such land, or some part thereof has been reduced to cultivation, the Secretary may, in his discretion, upon the payment of not less than \$1.25 per acre, cause a patent to issue for such land to any such citizen: Provided, That where the area so held is in excess of one hundred and sixty acres the Secretary may determine what particular subdivisions, not exceeding one hundred and sixty acres, may be patented hereunder: Provided further, That coal and all other minerals contained therein are hereby reserved to the United States; that said coal and other minerals shall be subject to sale or disposal by the United States under applicable leasing and mineral land laws, and permittees, lessees, or grantees of the United States shall have the right to enter upon said lands for the purpose of prospecting for and mining such deposits: And provided further, That no patent shall issue under the provisions of this chapter for any tract to which there is a conflicting claim adverse to that of the applicant,

unless and until such claim shall have been finally adjudicated in favor of such applicant. (Dec. 22, 1928, c. 47, p. 1, 45 Stat. 1069.)

1068a SAME; appraisal. Upon the filing of an application to purchase any lands subject to the operation of this chapter, together with the required proof, the Secretary of the Interior shall cause the lands described in said application to be appraised, said appraisal to be on the basis of the value of such lands at the date of appraisal, exclusive of any increased value resulting from the development or improvement of the lands by the applicant or his predecessors in interest, and in such appraisal the Secretary shall consider and give full effect to the equities of any such applicant. (Dec. 22, 1928, c. 47, p. 2, 45 Stat. 1070.)

APPENDIX B**ACT OF JUNE 7, 1924**

That the Secretary of the Interior is hereby authorized to sell to settlers or their transferees, under such terms, conditions, and price per acre as the said Secretary may prescribe, any lands in the Pyramid Lake Indian Reservation, in the State of Nevada, that have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act: Provided, that no more than six hundred and forty acres shall be sold to any one person or corporation: Provided further, That said sales shall be by private cash entry after it has been shown to the satisfaction of the Secretary of the Interior that the lands applied for have been settled upon, occupied, and improved as required by this Act, and in addition to such price per acre as may be fixed by the Secretary of the Interior all entrymen hereunder shall pay the same fees and commissions as provided by law where public lands are disposed of at \$1.25 per acre. The proceeds of said sales shall be deposited in the Treasury of the United States and be subject to appropriations by Congress for the Piute Indians of the said Pyramid Lake Indian Reservation.

2. That the Secretary of the Interior is also authorized to have a survey and plat made of the town of Wadsworth, in said Pyramid Lake Indian Reservation, and thereafter sell the unpatented lands embraced in the said town as provided for by section 2384 of the Revised Statutes of the United States, and on com-

pliance with said statute the purchasers of the lots shall acquire title as provided for by the said statute: Provided, That any lands within the limits of said town used for Indian school purposes or for other public use for Indians shall be, and the same are hereby, reserved from said town site, and the Secretary of the Interior, upon payment to him of the sum of \$100, is hereby authorized to convey by patent to the board of county commissioners of Washoe County, Nevada, or other proper school officials of the town of Wadsworth, Nevada, the lands now known as lots thirty-eight to forty-seven, inclusive, of block two in said town of Wadsworth, as surveyed in 1898 by T. K. Stewart: Provided further, That if there are any Indians residing in said town and in possession of and claiming any lots therein they shall have the same rights of purchase under the said statute as white citizens. The proceeds of the sale of lands in said town shall also be deposited in the Treasury of the United States and be used by the Secretary of the Interior for the Piute Indians of the Pyramid Lake Indian Reservation, and the proceeds derived from the sale of lands under section 1 of this Act are hereby made available for use by the Secretary of the Interior in making such surveys or resurveys within the said town site of Wadsworth as may be necessary to carry out the provisions of this Act.

3. That titles to lands in said Pyramid Lake Indian Reservation acquired by patents heretofore issued by the United States to any Railroad company, individual, or the State of Nevada, or by certification to the State of Nevada, are hereby confirmed.

4. All sales in accordance with section 1 of this Act

shall be made through the local land office within ninety days after the price of the land shall have been fixed by the Secretary of the Interior: Provided, That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation.

See 9775
same vol
No. 10319

7 9945
United States
Circuit Court of Appeals
For the Ninth Circuit.

VIRGINIA DAVIS HARTMAN and MARGA-
RET DAVIS RICHARDSON,

Appellants,

VS.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

DEC 28 1942

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

VIRGINIA DAVIS HARTMAN and MARGA-
RET DAVIS RICHARDSON,
Appellants,

VS.

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Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

RUSSELL P. TYLER, Esq.,
MARSHALL B. WOODWORTH, Esq.,
Russ Building
San Francisco, California
Attorneys for Plaintiffs and Appellants,

MORSE ERSKINE, Esq.,
G. D. SCHILLING, Esq.,
LOUIS FERRARI, Esq.,
MESSRS. KEYES AND ERSKINE,
625 Market Street
San Francisco, California
Attorneys for Defendant and Appellee.

In the District Court of the United States in and for the Northern District of California, Southern Division.

Civil No. 21021-R

VIRGINIA DAVIS HARTMAN and MARGARET DAVIS RICHARDSON,

Plaintiffs,

vs.

HAROLD F. DAVIS, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION et al.,

Defendants.

STIPULATION AS TO BANK OF AMERICA
NATIONAL TRUST & SAVINGS ASSOCIATION

It is hereby stipulated and agreed by and between the attorneys for plaintiffs and the attorneys for defendant, Bank of America National Trust & Savings Association, that, on the filing of the mandate of the Circuit Court of Appeals for the Ninth Circuit in the above-entitled case dismissing without prejudice the appeal heretofore taken by plaintiffs from the minute order of the above-entitled Court sustaining the motion to dismiss of said defendant, Bank of America National Trust & [1*] Savings Association, the above-entitled Court having made and entered its minute order on May 28, 1941,

*Page numbering appearing at foot of page of original certified Transcript of Record.

granting said motion to dismiss, with leave to plaintiffs of twenty days within which to amend, and plaintiffs declining and having failed to further amend said second amended complaint, the attorneys for said defendant Bank may file a final order, judgment and/or decree granting said motion to dismiss plaintiffs' second amended complaint.

San Francisco, California, September 16, 1942.

MARSHALL B. WOODWORTH,
RUSSELL P. TYLER,

Attorneys for Plaintiffs.

LOUIS FERRARI,
KEYES & ERSKINE,

By MORSE ERSKINE,

Attorneys for Defendant, Bank
of America N. T. & S. A.

So Ordered:

A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Sep. 17, 1942. [2]

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 21021-R

VIRGINIA DAVIS HARTMAN and MARGA-
RET DAVIS RICHARDSON,

Plaintiffs,

vs.

HAROLD F. DAVIS, et al.,

Defendants.

ORDER AND DECREE DISMISSING ACTION
AS TO ONE DEFENDANT

Bank of America National Trust and Savings Association, one of the defendants in the above entitled action, having made a motion to dismiss the second amended complaint of the plaintiffs in the said action as against the said Bank, and this court having made an order dismissing the said complaint but granting the said plaintiffs leave to amend. and the said plaintiffs having refused to amend.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the said second amended complaint of the plaintiffs as against the said Bank be and the same hereby is dismissed.

Dated: September 16, 1942.

A. F. ST. SURE,

District Judge.

[Endorsed]: Filed Sept. 17, 1942. [3]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now come Virginia Davis Hartman and Margaret Davis Richardson, the plaintiffs in the above-entitled suit, and hereby appeal from the final order and judgment of the above-entitled Court made and entered on the 16th day of September, 1942, sustaining the motion to dismiss of the defendant, Bank of America National Trust & Savings Association, to plaintiffs' Second Amended Complaint; that said defendant, Bank of America National Trust & Savings Association, is the appellee; that said appeal is being taken to the United States Circuit Court of Appeals for the Ninth Circuit.

San Francisco, California.

RUSSELL P. TYLER,
MARSHALL B. WOODWORTH,
Attorneys for Plaintiff and Appellants.

Receipt of Service.

[Endorsed]: Filed Oct. 22, 1942. [4]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know all men by these presents: That we, Virginia Davis Hartman and Margaret Davis Richardson, as principals, and New Amsterdam Casualty

Company, as sureties, are held and firmly bound unto Bank of America National Trust & Savings Association, in the full and just sum of Two Hundred and Fifty (\$250.00) Dollars to be paid to the said Bank of America National Trust & Savings Association, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seal and dated this 8th day of October, 1942 in the year of our Lord One Thousand Nine Hundred and Forty Two.

Whereas, lately as a District Court of the United States, for the Northern District of California, Southern Division, in suit depending in said Court, between Virginia Davis Hartman [5] and Margaret Davis Richardson, plaintiffs and appellants, and Bank of America National Trust & Savings Association, defendant and appellee, an order and judgment sustaining the motion to dismiss of Bank of America National Trust & Savings Association, defendant and appellee, was rendered against the said Virginia Davis Hartman and Margaret Davis Richardson, plaintiffs and appellants, and the said Virginia Davis Hartman and Margaret Davis Richardson, plaintiffs and appellants, having filed a notice of appeal, as required by law, to reverse the order and judgment in the aforesaid suit, to the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California;

Now, the condition of the above obligation is such, that if the said Virginia Davis Hartman and Margaret Davis Richardson, plaintiffs and appellants, shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, pursuant to the law, rules and statutes in such instances made and provided for and/or pursuant to Rule 34 of the said District Court.

[Seal] NEW AMSTERDAM CASU-
ALTY COMPANY.

By M. A. BAILEY,
Attorney-in-Fact.

Acknowledgment of Surety Company.

[Endorsed]: Filed Oct. 22, 1942. [6]

[Title of District Court and Cause.]

REQUEST FOR RECORD ON APPEAL

To the Clerk of the above-entitled Court and to the Bank of America National Trust & Savings Association, defendant and appellee, and to Messrs. Keyes & Erskine, attorneys for said defendant and appellee, San Francisco, California:

Kindly prepare certified copy of following papers for the appeal in the above-entitled case between the above-mentioned parties: (1) Stipulation filed

September 17, 1942, in re Bank of America mandate; (2) Order and decree re motion to dismiss second amended complaint; (3) Notice of appeal of October 22, 1942; (4) Bond for costs on appeal; (5) Statement of points on which appellants intend to rely; (6) Copy of this request for record on appeal.

This is in addition to the papers contained in Transcript of Record in case No. 9945 in the United States Circuit Court of Appeals for the Ninth Circuit between the same parties as are in- [7] volved on this second appeal which, by agreement of the attorneys for the respective parties on this appeal, are deemed to be and made part of the present appeal as well as the original complaint and the first amended complaint now on file, by stipulation of the parties, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in case No. 9945 above referred to.

San Francisco, Calif., October 23, 1942.

MARSHALL B. WOODWORTH,
RUSSELL P. TYLER,

Attorneys for Plaintiffs and
Appellants.

Receipt of the within Request for Record on Appeal is hereby acknowledged by copy this 23rd day of October, 1942.

KEYES & ERSKINE,

Attorneys for Defendant and
Appellee.

[Endorsed]: Filed Oct. 23, 1942. [8]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF THE RECORD, PROCEEDINGS AND
EVIDENCE TO BE INCLUDED IN REC-
ORD ON APPEAL

To the District Court of the United States, in
and for the Northern District of California:

Bank of America National Trust and Savings As-
sociation, the defendant and appellee, hereby desig-
nates additional portions of the record, proceed-
ings and evidence to be included [9] in the record
on appeal in the above entitled matter.

Consequently, in addition to those matters des-
ignated by the appellants, you will please prepare
and transmit to the United States Circuit Court,
Ninth Circuit, a true copy of the following papers,
records, proceedings and evidence to be contained
in the record on appeal in said matter, to-wit:

1. Original complaint filed on September 12,
1939.

2. First amended complaint filed on February
20, 1940.

Dated: October 28, 1942.

MORSE ERSKINE,
G. D. SCHILLING,
LOUIS FERRARI,
KEYES & ERSKINE,

Attorneys for Defendant and
Appellee.

[Endorsed]: Filed Oct. 31, 1942. [10]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL

(Assignments of Error)

Now come the plaintiffs and appellants and serve and file their statement of the points on which they intend to rely on the appeal as follows:

I.

That the Court erred in sustaining the motion to dismiss of the defendant and appellee, Bank of America National Trust & Savings Association, the plaintiffs' and appellants' second amended complaint.

II.

That the Court erred in holding and deciding that the plaintiffs' and appellants' second amended complaint did not state a cause of action as against defendant and appellee, Bank of America National Trust & Savings Association. [11]

III.

That the Court erred in holding and deciding that the plaintiffs' and appellants' second amended complaint did not set forth any facts showing or tending to show extrinsic fraud by and against defendant and appellee, Bank of America National Trust & Savings Association.

IV.

That the Court erred in holding and deciding that the plaintiffs' and appellants' cause of action, as set out in the second amended complaint, was barred by the Statute of Limitations as against the defendant and appellee, Bank of America National Trust & Savings Association.

Wherefore, the plaintiffs and appellants pray that the order and judgment of the above-entitled Court made and entered on the 16th day of September, 1942, sustaining the motion to dismiss of the defendant and appellee, Bank of America National Trust & Savings Association, to plaintiffs' and appellants' Second Amended Complaint, be reversed.

San Francisco, Calif.

RUSSELL P. TYLER,

MARSHALL B. WOODWORTH,

Attorneys for Appellants.

Receipt of the within Statement of Points On Which Appellants Intend to Rely on Appeal is hereby acknowledged by copy this 8th day of October, 1942.

MORSE ERSKINE,

KEYES & ERSKINE,

Attorneys for Appellee.

[Endorsed]: Filed Oct. 22, 1942. [12]

[Title of District Court and Cause.]

STIPULATION AS TO CERTAIN PORTIONS
OF RECORD DESIGNATED BY APPELLEE

In view of the fact that (1) original complaint filed on September 12, 1939, and (2) first amended complaint filed on February 20, 1940, heretofore filed in the above-entitled action, have already by stipulation of the parties been certified by the Clerk of the above-entitled Court as part of the record on appeal on the previous appeal, dismissed without prejudice to a further appeal, in case No. 9945 between the same parties, it is hereby stipulated and agreed that the Clerk of the above-entitled Court need not prepare and/or transmit to the United States Circuit Court of Appeals, Ninth Circuit, a true copy of the (1) original complaint filed on September 12, 1939, and (2) first amended complaint filed on February 20, 1940.

San Francisco, Calif., November 2, 1942.

MORSE ERSKINE,

G. D. SCHILLING,

LOUIS FERRARI,

Attorneys for Defendant and
Appellee.

Attorney for Plaintiffs and
Appellants.

[Endorsed]: Filed Nov. 3, 1942. [13]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 13 pages, numbered from 1 to 13, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Virginia Davis Hartmen, et al, Plaintiffs, vs. Harold F. Davis, et al, Defendants, No. 21021-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Two-Dollars and Fifteen-Cents (\$2.15) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 27th day of November, A. D. 1942.

[Seal] WALTER B. MALING,
Clerk.

WM. J. CROSBY,
Deputy Clerk. [14]

[Endorsed]: No. 10319. United States Circuit Court of Appeals for the Ninth Circuit. Virginia Davis Hartman and Margaret Davis Richardson, Appellants, vs. Bank of America National Trust & Savings Association, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 30, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10319

VIRGINIA DAVIS HARTMAN and MARGA-
RET DAVIS RICHARDSON,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION, et al.,

Appellee.

DESIGNATION OF RECORD TO BE
PRINTED AND STATEMENT OF POINTS
RELIED UPON

To Clerk of Circuit Court of Appeals and Messrs.
Keyes & Erskine, Attorneys for Appellee, San
Francisco, Calif.:

Now come the appellants and designate, pursu-
ant to the rules of the above-entitled Court, the rec-
ord to be printed on the appeal and hereby re-
quest, direct and designate that all of the transcript
on appeal as certified be printed; and further state
that they will rely upon each, every and all of the
statements of points and assignments of error in-
cluded and set forth in the certified transcript on
appeal.

Dated: December 3, 1942, San Francisco, Calif.

MARSHALL B. WOODWORTH,
RUSSELL P. TYLER,

Attorneys for Appellants.

Receipt by copy of the above Designation of Record to Be Printed etc. is hereby admitted this 3rd day of December, 1942.

KEYES & ERSKINE,

Attorneys for Appellee, Bank
of America N.T.S.A.

[Endorsed]: Filed Dec. 4, 1942.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AS TO TRANSCRIPT
AND BRIEFS

It is hereby stipulated and agreed by and between the attorneys for appellants, Virginia Davis Hartman and Margaret Davis Richardson, and the attorneys for appellee, Bank of America National Trust and Savings Association, that the transcript of record on the present appeal may be, and is, hereby supplemented by the transcript of record in Case No. 9945 in the United States Circuit Court of Appeals for the Ninth Circuit between the same parties appellants and appellee and that the same is hereby made part of the transcript of record on the present appeal;

And it is further hereby stipulated and agreed that the record on the present appeal shall be deemed to include all other papers and exhibits heretofore filed on said appeal in Case No. 9945, whether printed as part of the transcript in that case or not;

And it is further stipulated and agreed that the briefs of respective counsel for appellants and appellee in Case No. 9945 shall be deemed and considered and filed as the briefs on the present appeal, subject to the right of respective counsel to file such further or supplemental briefs as they may be advised, with the permission of the court.

MARSHALL B. WOODWORTH,
RUSSELL P. TYLER,

Attorneys for Appellants.

MORSE ERSKINE,
LOUIS FERRARI,
KEYES & ERSKINE,
GEORGE D. SCHILLING,

Attorneys for Appellee, Bank of
America National Trust
and Savings Association.

So Ordered:

CURTIS D. WILBUR,
Senior U. S. Circuit Judge.

[Endorsed]: Filed Dec. 4, 1942.

See 9945-

10519

~~10518~~

No. ~~9945~~

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

VIRGINIA DAVIS HARTMAN and MARGARET
DAVIS RICHARDSON,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,

Appellee.

APPELLANTS' REPLY BRIEF.

RUSSELL P. TYLER,

Russ Building, San Francisco,

MARSHALL B. WOODWORTH,

602 California Street, San Francisco.

Attorneys for Appellants.

FILED

DEC - 1 1942

PAUL P. O'BRIEN,
CLERK

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

VIRGINIA DAVIS HARTMAN and MARGARET
DAVIS RICHARDSON,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,

Appellee.

APPELLANTS' REPLY BRIEF.

An examination of the points and authorities submitted by the able counsel for the appellee Bank in Brief for Appellee discloses that there are but two points upon which the appellee Bank (hereinafter called defendant Bank) relies.

The first point is that the second amended complaint does not state facts sufficient to show *extrinsic* fraud. The second point raised is that the Statute of Limitations is a bar, because the pleading is not sufficient to show that the fraud was discovered within three years next preceding the commencement of the action.

The motion to dismiss, which is the equivalent of a demurrer, admits all of the facts set up in the second amended complaint to be true.

The able counsel, in their Brief for Appellee, present plausible arguments in their usual masterly way and make a frantic effort to save the defendant Bank from being put on its defense for the fraud committed by it and the other defendants, in victimizing the appellants, plaintiffs in the Court below. They tacitly admit that the Bank committed the frauds charged against it and the other defendants, as set out in the second amended complaint, but they seek refuge behind the weak and tenuous defense that the fraud was *intrinsic* and therefore cannot be reached or corrected in a Court of justice.

The appellants stoutly maintain that the affirmative allegations of the second amended complaint, admitted to be true for the purposes of the motion to dismiss, present a clear case of *extrinsic* fraud which is actionable in a Court of equity.

Many of the points endeavored to be made by counsel for defendant Bank would have us plead evidence which is not the purpose of, nor is it correct, pleading. We endeavor, in the second amended complaint, to allege only the ultimate facts.

Extrinsic Fraud.

We allege that the defendant Dole was advised by the defendants Humphrey and Elkins, who acted not only as the attorneys for appellants and Dole, but also for defendant Bank as the special administrator of the estate of Martina Maxine Dole, deceased, and her heirs (including appellants), not to appear before the Probate Court at the hearing of said petition to compromise the fraudulent indebtedness of defendant

Sinai, so that he (Dole) could not voice his protest or testify in open Court his objections to the totally inadequate and unconscionable compromise, which was being forced upon the Probate Court by the defendant Bank, as special administrator, even over the protest of the Bank's own attorneys, defendants Humphrey and Elkins, and by suppressing from the Probate Court the true facts of the compromise. If this does not constitute a bare-faced fraud of an *extrinsic* character, then we find it difficult to imagine one that does.

Such acts of fraud and similar ones come squarely within the salutary doctrine of *extrinsic* fraud, as is well stated by the Supreme Court of California in *Bergin v. Haight*, 99 Cal. 52, 55, as follows:

*"To be actionable, as stated by our chief justice in Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, it must be 'a fraud extrinsic or collateral to the questions examined, and determined in the action * * * Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat, or being regularly employed, corruptly sells out his client.' The fraud herein cited relied upon falls within the principle illustrated by the example stated above, and certainly within the principle underlying many other cases."* (Citing many cases.)

In the early and leading case of *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, the Supreme Court

points out clearly that where a fiduciary relationship is relied upon *the facts constituting the fraud are extrinsic in their character*, using the following language:

“But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to a suit, there was, in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, *as by keeping him away from court*, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and *connives at his defeat*; or where *the attorney regularly employed corruptly sells out his client’s interest to the other side*—these and similar cases which show that there never has been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and upon the case for a new and fair hearing.” (Italics ours.)

See, also, language of the Supreme Court of California in the leading case, on *extrinsic fraud*, of *Campbell v. Campbell*, 152 Cal. 201. See, also, the many cases on *extrinsic fraud* cited by us in Appellants’ Opening Brief. (Pages 28, 32-33, 38-48.)

We further allege, as *extrinsic fraud*, that defendant Bank’s own attorneys, defendants Humphrey and Elkins, advised defendant Bank that said compromise

was illegal and a fraud on the heirs, including appellants (plaintiffs), of said Martina Maxine Dole, deceased, and so advised the Bank as such special administrator but that said defendant Bank, its officials and agents, informed said defendants Humphrey and Elkins that said Humphrey and Elkins were acting as the attorneys of said defendant Bank, as special administrator, and that said Bank was not asking the opinion of its said attorneys, Humphrey and Elkins, as to matters of policy, and if they were unwilling to present to the Probate Court a petition for compromise in the sum of \$5000 (whereas the second amended complaint alleges that the property involved was worth the sum of some \$3,000,000), said defendant Bank would procure the services of other attorneys to represent it as special administrator; in other words, that the Bank committed a fraud, *extrinsic fraud*, in forcing through a grossly inequitable compromise, of all of which facts the appellants (plaintiffs), living in New York, were kept in complete ignorance by their own lawyers, Humphrey and Elkins, who also acted as attorneys for defendant Bank as special administrator.

If such fraudulent conduct on the part of the defendant Bank and of its attorneys, who were also the attorneys for the appellants (plaintiffs), does not constitute *extrinsic fraud*, then it is difficult to imagine a case that does.

In fact, under the allegations of the second amended complaint, the defendant Bank was the principal bad actor and played a most vital part in the fraudulent

scheme by the Bank and the other defendants including its attorneys, who also represented the Estate of Martina Maxine Dole and her heirs, to force through the inequitable and fraudulent compromise by purposely suppressing the true facts of the compromise from the Probate Court resulting in that Court approving the compromise, which the defendant Bank, taking advantage of its own unconscionable wrong, now claims is *res adjudicata* and the gross fraud motivating such compromise *intrinsic*.

The second amended complaint affirmatively sets up many other facts which were fraudulently suppressed from the Probate Court of San Mateo County, California, when the compromise in the meagre and totally inadequate sum of \$5000 was forced through by the defendant Bank and its attorneys, which, had the same been honestly and fairly presented to the Probate Court, it is inconceivable the Court ever would have approved the compromise.

But all of these matters of the fraudulent conduct of the defendant Bank and of the other defendants and their intimate fiduciary relations are fully alleged in the second amended complaint and were exhaustively discussed and pointed out by us in Appellants' Opening Brief and, to do so again, would only involve repetition.

One point should, however, be stressed. That is, that there is nothing in the second amended complaint or in any of the previous complaints to indicate that appellants (plaintiffs) gave to defendant Dole any authority save and except as stated in paragraph XXIII which, so far as is applicable, is as follows:

“That the said defendant, Arthur A. Dole, further advised the said plaintiffs that there were certain matters involving the property of the said Martina Maxine Dole, deceased, that would require attention and likewise services of an attorney or attorneys at law to represent said heirs of the said Martina Maxine Dole, deceased, as aforesaid, and that he, the said defendant, Arthur A. Dole, had or was about to procure the services of the said defendant, C. F. Humphrey and Luther Elkins to represent him as an heir at law of the said Martina Maxine Dole, deceased, and *suggested* that he, the defendant Arthur A. Dole, would be very glad to protect the interests of the said plaintiffs and to have said defendants, C. F. Humphrey and Luther Elkins, act as attorneys for all of the heirs at law, including said plaintiffs, of the said Martina Maxine Dole, deceased; that said *suggestion* met with the approval of said plaintiffs and said approval was communicated by them to the said defendant, Arthur A. Dole; *that the said defendant Arthur A. Dole did not at said time or at any time subsequent thereto advise the said plaintiffs specifically as to any of the property or other rights belonging to the said deceased, Martina Maxine Dole, and more particularly any or all of the facts or circumstances involved and existing between said Martina Maxine Dole, deceased, during her lifetime and the said defendants Samuel Platt and John S. Sinai concerning the purchase of the said mining property, all of which has been heretofore more specifically alleged and set forth.*” (See Par. XXIII, Tr. 21-22.)

Clearly, defendant Dole was not, by these words, made an *attorney in fact* of the appellants (*plaintiffs*)

with the right to compromise claims. The language is clear that to protect the interest of appellants (plaintiffs) and himself, he was authorized to employ attorneys at law. Once he did that, his agency, if such it can be termed, was ended. Any knowledge he had then or acquired subsequent to that time, was not transferred or imputed to the appellants (plaintiffs). Therefore, before discussing any of the points raised by defendant Bank, let us consider some general rules as to agency.

Section 2321 of the Civil Code of the State of California reads as follows:

“When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned.”

See, also:

Billings v. Morrow, 7 Cal. 172, 174.

The special authority given by appellants (plaintiffs) to defendant Dole was to engage counsel for them as heirs. From the moment Dole did that, and the second amended complaint alleges in paragraph XXIV that he did hire Elkins and Humphrey, a confidential relationship existed between appellants (plaintiffs) and Elkins and Humphrey. This one act of Dole was the sum total of the agency relationship between Dole and the appellants (plaintiffs). We stress this point particularly because counsel for defendant Bank tries to imply at various opportunities that we are bound by Dole's knowledge of the compromise, by statements made to Dole by Humphrey and Elkins, by the legal opinion rendered to Dole and

similar incidents. Dole, being the agent for a limited purpose only, any knowledge of Dole, not acquired within the scope of his agency is not binding on appellants (plaintiffs).

Now we come to the crux of the second amended complaint. Appellants (plaintiffs), through Dole, engaged Humphrey and Elkins as their attorneys to represent them in the probate proceedings. Humphrey and Elkins accept that employment and in addition to that, accept employment as counsel for the special administrator, the defendant Bank. Usually, in probate proceedings, no conflict exists between the heirs and the administrator, and clearly, at the outset of the probate proceedings, no conflict existed. The allegations of paragraph XXV (Tr. 25-26) allege that Humphrey and Elkins strenuously objected to the contemplated compromise. From that moment on, a conflict existed between the heirs and the administrator and from that moment on Humphrey and Elkins represented conflicting interests. From that moment on Humphrey and Elkins did not give to the appellants (plaintiffs) the representation they were entitled to; from that moment on Humphrey and Elkins became the servile and supine tools and employees of the defendant Bank, and did its bidding instead of being loyal and faithful to the appellants (plaintiffs); from that moment on appellants (plaintiffs) *unknowingly* lost their legal representation in Court.

All of these *extrinsic* facts were purposely suppressed from the Probate Court, as alleged in the second amended complaint, when the unfair and un-

just compromise came up before the Probate Court for approval.

Of all of which facts, the appellants (plaintiffs) were kept in complete ignorance as is alleged in paragraph XXIV (Tr. 42-43.)

Again we quote to this Court *U. S. v. Throckmorton*, 98 U. S. 61, previously cited by us, and *Bergin v. Haight*, 99 Cal. 52; *Caldwell v. Taylor*, 218 Cal. 417, 23 Cal. L. R. 79.

Now, as far as Humphrey and Elkins are concerned they owed to the appellants (plaintiffs) the highest degree of trust. The relationship of attorney and client is of the highest fiduciary character.

Clark v. Millsap, 197 Cal. 765;

Metropolis Trust and Savings Bank v. Mounier, 169 Cal. 592, 596.

“An attorney may not assume a position adverse to his client for it is a violation of the duty which an attorney owes his client to assume an attitude antagonistic to him without his knowledge or consent. By virtue of this rule, the attorney is precluded from assuming any relation toward his client which would prevent him from devoting his entire energies to his client’s interests.”

3 Cal. Juris. 618.

See:

Elberta Oil Co. v. Superior Court, 108 C. A. 344;

Anderson v. Eaton, 211 Cal. 113;

Felton v. Le Breton, 92 Cal. 457.

We not only plead that because of the acts of the Bank and Sinai the appellants (plaintiffs) were defrauded, but also, because of the acts of our own attorneys, we were prevented from presenting to the Court the true facts of the transaction involved in the compromise, prevented from having our day in Court. Counsel for defendant Bank goes on to say that the allegations of subsection (b), paragraph XXXI, imply that the lawyers, Humphrey and Elkins, were acting in good faith. If, in fact, they acted in good faith, is a *question for the trial Court*. As far as the appellants (plaintiffs) were concerned, they were deprived of representation in the Probate Court the moment the interests of the administrators and heirs were conflicting and their lawyers were acting adversely to the interest of the appellants (plaintiffs), an adverse interest the appellants (plaintiffs) did not know until they were put on notice by reason of certain recitals in the answer of John D. Sinai to appellants' (plaintiffs') complaint on file herein. Then only appellants (plaintiffs) discovered the facts of the adverse interest of the defendant Bank, the lack of independent legal representation and the facts forming the *extrinsic* fraud, as set out in the second amended complaint. (See Par. XXXIV, Tr. 42-43.)

Surely, under the circumstances set forth, the Probate Court was not informed of the true existing facts. If appellants (plaintiffs) would have been represented in the Probate Court by attorneys acting on their behalf and through some fraud of an adverse party the Court would have been misinformed, then the fraud would have been *intrinsic*, *but where the appel-*

lants (plaintiffs) were prevented from presenting their case by their own attorneys' failure to cooperate because of their adverse position as attorneys for the defendant Bank, following the instructions of that Bank rather than their conscience, knowing definitely that those instructions were not to the interest of their clients and the estate of Mrs. Dole, then the fraud became extrinsic. Here we have not only actual fraud by the Bank and Sinai, but also constructive fraud arising out of the fiduciary relationship existing between appellants (plaintiffs) and Humphrey and Elkins, and a fraudulent breach of that duty.

“Where there exists a relation of trust and confidence, it is the duty of the one in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question and any concealment of material facts is a fraud.”

12 Cal. Juris. 772.

No such disclosure was made to the appellants (plaintiffs) by their defendant lawyers, nor by defendant Bank, its special administrator. (Par. XXXIV, Tr. 42-43.)

The knowledge of Dole as to the common agency of the lawyers cannot be imputed to these appellants (plaintiffs). That agency terminated when Dole obtained for appellants (plaintiffs) the service of these lawyers. There is no allegation in the second amended complaint that defendant Dole had a power of attorney from the appellants (plaintiffs) or was their agent for any purpose save to employ attorneys.

Counsel for Bank stresses that there is no allegation in the second amended complaint that the Bank received any benefits of any sort from the alleged fraud, etc. (See page 12 of Brief for Appellee.)

In the first place, whether the defendant Bank received any benefit or not is a matter of proof and evidence.

In the second place, whether the defendant Bank received any benefits or not is immaterial. It is charged that the defendant Bank has participated in the fraudulent acts. The test, in cases of fraud or conspiracy to defraud, is not what benefit the party committing the fraud or guilty of conspiracy to defraud received, *but what injury or damage the victim of the fraud suffered by the tortious and fraudulent acts of the defendant Bank, its officials, attorneys, fiduciaries and employees.*

The second amended complaint contains allegations as to *extrinsic* fraud not found in the original complaint on which a motion to dismiss was granted. Neither the original complaint nor amended complaint contain these allegations.

These allegations are new and are specially directed to facts alleged showing *extrinsic* fraud. We refer to paragraphs XXIII to XXXI of the second amended complaint especially paragraphs XXIII, XXIV, XXV and XXXI. (Tr. 21-41.)

Paragraph XXIII contains the allegations of the death of Mrs. Dole, the communication of said death by Mr. Dole to the present appellants (plaintiffs),

the suggestion by Mr. Dole of employing attorneys to protect the heirs and the communication of the approval of said suggestion by the present appellants (plaintiffs) to Mr. Dole. (Tr. 21-22.)

Paragraph XXIV alleges that said Dole engaged the services of the defendants Humphrey and Elkins as the attorneys of the heirs, that he discussed with said attorneys all the facts and circumstances concerning the transaction between Platt and Sinai and that he entered into a written contract with said Humphrey and Elkins as attorneys for the heirs of Mrs. Dole. That paragraph further alleges the fact that Humphrey and Elkins were not only acting as attorneys for the heirs but also as attorneys for the administrator, to-wit, the defendant Bank. (Tr. 22-25.)

Paragraph XXV alleges the contemplated compromise between the defendant Bank as administrator and defendant Sinai and further shows the strong objections made by Humphrey and Elkins, which in fact were withdrawn because subsequent to it, as shown in paragraph XXVI, Humphrey and Elkins appeared as attorneys for the defendant Bank as administrator in the Probate Court supporting that same compromise to which they so strongly objected to the defendant Bank. (Par. XXV, Tr. 25-26.)

Paragraph XXXI contains the allegations as to the fraud of the various defendants mentioned and *the acting in concert* in the procuring of the compromise alleging specifically that said fraud is *extrinsic*.

Subparagraph (a) shows the relationship of John S. Sinai as a director of the First National Bank of Nevada. It further shows that Sinai and Platt were attorneys for said Bank and in addition it shows that the said Bank was owned, operated and controlled by the Transamerica Corporation, a holding corporation of which the defendant Bank of America is a subsidiary. Subparagraph (b) shows the representations by Humphrey and Elkins to Dole that an opposition to the petition to compromise and an appearance by him before the Probate Court would accomplish nothing and advising him not to appear in Court and that they, Humphrey and Elkins, would represent the heirs at the hearing (Par. XXXI, Tr. 31-41.)

Subparagraph (c) of XXXI shows that Humphrey and Elkins failed to inform the Probate Court of all the facts and circumstances surrounding the transaction and further failed to inform the said Court of the common and fiduciary interests of the Bank of America, First National Bank of Nevada and Sinai and Platt. And further failed to inform said Court of their dual relationship as attorneys for the heirs, including appellants (plaintiffs) and the administrator, the defendant Bank. The allegations of subparagraph (d) show that said attorneys failed to inform the Court of the true value of the alleged indebtedness or of the property then held by said defendant John S. Sinai and belonging to Martina Maxine Dole, deceased, and the said heirs. (Tr. 37-39.)

Subparagraph (e) of XXXI alleges that said defendant Bank, as special administrator, and defend-

ants Humphrey and Elkins failed to inventory the real property of the said deceased. (Tr. 41.)

Subparagraphs (b), (c), (d) and (e) of XXXI allege, in substance, that the appellants (plaintiffs) were betrayed and sold out by their attorneys, defendants Humphrey and Elkins, who were also the attorneys for the defendant Bank as special administrator when, in spite of the fact that they had advised defendant Dole that the compromise of some \$5000 was grossly inadequate and unconscionable and had even, as attorneys for defendant Bank as special administrator, protested to the Bank itself and were curtly informed by the Bank that if they did not obtain from the Probate Court the approval of the compromise in the meagre sum of \$5000 the Bank would obtain other attorneys, and thereupon said defendants Humphrey and Elkins, without obtaining the consent of the appellants or without advising them of the situation or any warning to them of the antagonistic attitude of the defendant Bank, supinely submitted to the dictates of the defendant Bank and became their willing tools and forsook and betrayed the interests of the appellants, who lived in New York and were kept in total ignorance of these machinations, and suppressing this unconscionable fraud from the Probate Court obtained the inequitable compromise which the defendant Bank has the effrontery to claim is *intrinsic* fraud and *res adjudicata*.

The second amended complaint, in the paragraphs above mentioned, clearly shows that the fraud here is *extrinsic* and *collateral* and was not in issue before

the Probate Court. The dual relationship of Humphrey and Elkins acting as attorneys for the heirs and for the Bank, knowing that the interests of the Bank and the heirs were conflicting, was naturally *extrinsic* fraud. The failure of the administrator and the attorneys for the heirs to inform the Probate Court and the appellants (plaintiffs) of all the circumstances surrounding the transaction to be presented to the Probate Court was *extrinsic* fraud preventing these appellants (plaintiffs) from raising any objections to those proceedings, depriving them of their just day in Court.

The leading case of *United States v. Throckmorton*, 98 U. S. 61, clearly states the law on *extrinsic* fraud.

Sohler v. Sohler, 135 Cal. 323;

Simonton v. L. A. Trust & Savings Bank, 192 Cal. 651;

Campbell v. Campbell, 152 Cal. 201;

Curtis v. Schell, 129 Cal. 208;

Bergin v. Haight, 99 Cal. 52;

Johnson v. Waters, 111 U. S. 640;

Strates v. Dimotsis, 110 F. (2d) 374-376.

In the case of *Strates et al. v. Dimotsis*, *supra*, prospective bidders were kept from going to Court by the special administrators, deprived of their day in Court (acts of *extrinsic* fraud). In the case at bar, not alone defendant Dole but the heirs were, by the acts of their own attorneys and the defendant Bank, deprived of their day in Court and the same attorneys and the defendant Bank suppressed from the Court the fact that the amount of the compromise was totally inadequate and was a fraud on the estate and heirs.

two of whom, appellants (plaintiffs) were absent from the state and knew nothing of the frauds. (Par. XXXIV, Tr. 42-43.)

Counsel for defendant Bank, on pages 40-41-42 of their Brief for Appellee, indulge in a fanciful but specious explanation of the conduct of defendants Humphrey and Elkins, the attorneys for defendant Bank as special administrator, as well as the attorneys for defendant Dole and the appellants (plaintiffs). They say, facetiously, we assume:

“There is no suggestion of fraud in this. On the contrary, it suggests that Humphrey and Elkins on one hand and Dole on the other were seeking to play a smart game in the transaction; that they were seeking to obtain from Sinai his \$5000.00, believing that the heirs were not bound by the settlement and that they would be able to proceed against Platt. They were hoist on their own petard. At least so far as the Bank is concerned, their smart trick has not worked. But the essential point is that the complaint does not suggest that Humphrey and Elkins in giving this written opinion to Dole were acting in collusion with the Bank for the purpose of preventing Dole from presenting his case upon the hearings.” (See page 41 of Brief for Appellee.)

They forget that, under the allegations of the second amended complaint, the defendants Humphrey and Elkins, attorneys for the defendant Bank as special administrator, were compelled to, and did, submit to the dictation and domination of the defendant Bank, although they had previously advised the defendant Bank and the defendant Dole that the compromise

in the sum of \$5000 was totally inadequate and unconscionable and illegal, in which advice they were ruthlessly overruled by the defendant Bank; and, under threat of summary dismissal as attorneys, servilely and supinely submitted to the dictates of the defendant Bank and sacrificing the interests of the estate and the heirs including appellants (plaintiffs) for that of the defendant Bank, went before the Probate Court and obtained the orders and judgment of that Court approving the unjust compromise, suppressing from the Court the real and true facts involved in the inequitable and unconscionable compromise and keeping defendant Dole away from Court so he could not protest his objections as an heir of the estate.

If the allegations of the second amended complaint do not set forth *extrinsic acts of fraud* sufficient to attack collaterally the judgment of the Probate Court in San Mateo County, California, then by no stretch of the imagination can any complaint be framed which could set forth any *extrinsic fraud*.

Reducing to a narrow compass the allegations of the second amended complaint against the defendant Bank and the other defendants, they disclose:

(1) That defendant Sinai, the attorney for Martina Maxine Dole during her lifetime, betrayed his sacred trust as her attorney and confidential adviser and sold her out, by acquiring for himself and his law-partner Sam Platt, both defendants, the valuable mining property (alleged to be worth \$3,000,000), which rightfully belonged to Martina Maxine Dole

during her lifetime and to her heirs (appellants-plaintiffs) after her death;

(2) During all this time, defendants Sinai and Platt were the attorneys for defendant Bank as well as directors of one of its branch banks in Nevada controlled by its parent corporation, Transamerica Corporation, of which defendant Bank was and is one of its subsidiaries in Nevada as well as in California, and perforce occupying positions of the closest fiduciary relations with the defendant Bank;

(3) When the defendant Sinai was trying to settle (in itself an admission of guilt) for the paltry sum of \$5000 his fraudulent conduct to his erstwhile client, Martina Maxine Dole, the defendant Bank, acting as special administrator of the estate of Martina Maxine Dole and of her heirs including appellants (plaintiffs), comes forward and, as such special administrator, dictates and dominates the legal situation by forcing through the inequitable and unconscionable compromise sought to be made by defendant Sinai for his fraudulent conduct, by arbitrarily overruling its own attorneys, who were also the attorneys for the appellants (plaintiffs), and by refusing to permit its own attorneys to voice or make any protest or objection to the compromise in the sum of \$5000 as being grossly inadequate and inequitable to the estate and to the heirs, under threat to said attorneys of summary dismissal and, after its own attorneys, rather than losing their job as such, supinely submit to the dictates and domination of the defendant Bank and, having previously advised defendant Dole not

to go to Court or protest the compromise, actually go before the Probate Court and represent to that Court in behalf of defendant Bank as special administrator that the compromise with defendant Sinai was "for the best interests of the estate and the heirs", and, in so doing, actually suppressed the real and true facts involved in said crooked and venal compromise, when they knew in their own hearts that such compromise was not for the best interests of the estate and the heirs, the defendant Bank, as such special administrator, owing the highest fiduciary duty to the estate and to the heirs, became the controlling factor—the real culprit—in forcing through and effecting the grossly inadequate and unconscionable compromise in the sum of \$5000 and is just as culpable in this fraud on the estate and the heirs as are its own attorneys, Humphrey and Elkins, and the defendant Sinai and the other defendants who figure in this fraud as alleged in the second amended complaint.

All of these acts or facts of fraud were not before the Probate Court when it heard and made its orders approving the inadequate and unconscionable compromise; it was not an issue before the Court; the defendant Dole was purposely advised not to appear before the Probate Court by the attorneys for the defendant Bank as special administrator who were also the attorneys for the appellants (plaintiffs); the real, true facts involved in this compromise were all purposely suppressed from the Probate Court; they all constituted acts of *extrinsic fraud* sufficient to attack collaterally the orders and judgment of the Probate Court approving this unholy compromise.

If ever a case of fraud was adequately alleged it is the unconscionable fraud set forth in the second amended complaint and the motion to dismiss should be denied and the defendant Bank compelled to answer and the case be tried on its merits.

It is to be noted that the defendant John Sinai, the attorney for the deceased, and who is alleged to be one of the chief and active participators in the fraud practiced on the deceased and on the heirs, after filing dilatory motions, which were overruled, has answered and the case is at issue as to him. He was charged jointly with the defendant Bank and its officers, attorneys and employees in the fraud practiced on the deceased and on the heirs. The defendant Bank is responsible for the acts of its officers, attorneys, fiduciaries and employees in committing frauds within the scope of their employment.

The second amended complaint plainly and clearly charges that the various defendants and defendant Bank were "*acting in concert and motivated by the common design of procuring the aforesaid compromise, said fraud being extrinsic in its nature and character*". (Par. XXXI; Tr. 32.)

This language charges, in effect, a joint fraud or conspiracy to defraud appellants (plaintiffs).

Under all of the allegations of the second amended complaint, the motion to dismiss should have been denied by the Court below and defendant Bank compelled to "*go to issue and proofs*".

Bayley & Sons v. Blumberg, 254 Fed. 690-693.

II.

DEFENSE OF STATUTE OF LIMITATIONS.

This is made the basis of the last three grounds of the motion to dismiss by the defendant Bank. These grounds are as follows:

“Third, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by laches.

Fourth, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

Fifth, that the said complaint shows upon its face that any claims the said plaintiffs may be asserting by the said complaint against the said Bank are barred by Section 343 of the Code of Civil Procedure of the State of California.”
(Tr. 46-47.)

These three grounds may be reduced to one contention and that is that the statute of limitations is barred because the second amended complaint is not sufficient to show that the fraud by defendant Bank and the other defendants was discovered within three years next preceding the commencement of the action.

Subd. 4 of Section 338 of the California Code of Civil Procedure provides a period of three years in:

“An action for relief on the ground of *fraud* or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

Section 343 of the California Code of Civil Procedure provides:

“An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.”

The allegations of the second amended complaint affirmatively set forth that the appellants (plaintiffs) commenced their action for fraud against the defendant Bank and the other defendants within three years of the plaintiffs' discovery of the facts constituting the fraud practiced on them. Their suit was filed on the 12th day of September, 1939, in the Superior court of the State of California in and for the City and County of San Francisco. It was removed to the United States District Court in and for the Northern District of California, Southern Division, under the sanction and authority of the Federal Removal Act.

The allegations of the second amended complaint fully meet and negative any laches on the part of the appellants (plaintiffs) and set up and show that they acted promptly and diligently and within three years after their discovery of the fraud practiced on them by the defendant Bank and the other defendants. It must be remembered that the second amended complaint sets up that the appellants (plaintiffs) were and are residents of New York and lived there during all of the times during which the machinations and fraudulent conduct of the defendant Bank and the other defendants were going on in California and in Nevada. (Tr. 20-21; 42-43.)

The appellants first learned of the fraud practiced on them as heirs of the estate of Martina Maxine

Dole in April and July of 1938 and they commenced their action in *September, 1939*, a little over a year after their discovery of the fraud. They certainly acted both promptly and diligently, and within the statutory period of three years after their discovery of the fraud as provided by Sub. 4 of Section 338 and Section 343 of the California Code of Civil Procedure.

Counsel for defendant Bank admits that the second amended complaint states *when* the discovery of the fraud was made but denies that the complaint states sufficient allegations *what* the discovery was, *how* it was made and *why* it was not made sooner. *What* the discovery was, is clearly set forth in paragraphs XXIV to and including XXIX (Tr. 22-30); *how* it was made is set forth in paragraph XXXIV (Tr. 42-43) in which it is positively stated that none of the facts were known to said appellants (plaintiffs) at the time of filing the above entitled action, that appellants (plaintiffs) were placed upon investigation of said facts and circumstances by reason of certain recitals contained in the answer of said defendant John S. Sinai; as to the third point *why* the discovery was not made sooner, the allegations of the complaint show that Dole informed them, that their sister had died, and that he would have defendants C. F. Humphrey and Luther Elkins act as attorneys for all of the heirs-at-law. Appellants (plaintiffs) consented to it. The complaint continues that Dole hired defendants Humphrey and Elkins as the attorneys of the heirs-at-law. There were no circumstances to put appellants (plaintiffs) upon inquiry. They had a perfect right to rely upon the fact that they had attorneys representing them who would inform them of

any events which might alter appellant's (plaintiff's) position.

In *Tarke v. Burgham*, 123 Cal. 163, at 166, it is said:

“Where no duty is imposed by law upon a person to make inquiry and where under the circumstances a ‘prudent man’ would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty and the failure to make it a negligent omission.”

See, also,

Denson v. Pressey, 13 Cal. App. (2d) 472.

As to Dole's knowledge of the fraud, may we refer the Court to our earlier discussion. Nowhere in the second amended complaint is there any allegation from which anybody can draw the conclusion that Dole was the agent of the appellants (plaintiffs) for any other purposes than to employ counsel for them. Counsel for appellee Bank is very well aware of the rule of law that agent's knowledge can only be imputed to his principal if acquired within the course and scope of his agency. Clearly Dole was not a general agent of appellants (plaintiffs) but only a special agent, if at all, for the purpose of procuring for appellants' (plaintiffs') attorneys to represent them. Clearly the mere fact that they are jointly interested as heirs in the same estate does not create an agency relationship.

Therefore, the second amended complaint is sufficient to show that the action is not barred by the

statute of limitations, inasmuch as the action was commenced within three years after the discovery by the appellants (plaintiffs) of the fraud practiced on them by the defendant Bank, and there were no facts known to appellants (plaintiffs) to put them on inquiry previous to their discovery of the fraud as alleged in the second amended complaint.

CONCLUSION.

In concluding this reply brief on behalf of appellants (plaintiffs), we desire to say that if the allegations of the second amended complaint do not set forth *extrinsic acts of fraud* sufficient to attack collaterally the judgment of the Probate Court in San Mateo County, California, then by no stretch of the imagination can any complaint be framed which would set forth any *extrinsic fraud*.

Furthermore, it is the practice of State and Federal Courts, in actions in equity involving important matters to go "to issue and proofs" where a doubtful question is raised by the pleadings. This rule should, in the interests of justice, be applied to the case at bar.

As was well said by the Circuit Court of Appeals in *Bayley & Sons v. Blumberg*, 254 Fed. Rep. 690-693:

"In *Ralston Steel Car Co. v. National Dump Car. Co.* (D. C.), 222 Fed. 590, it is said:

'Under our practice, the federal courts are inclined to allow a case in equity involving important matters to go to issue and proofs, where

a doubtful question is raised by the pleadings. It has been the practice to overrule a demurrer, unless it is founded upon an absolutely clear proposition that, taking the allegations to be true, the bill must be dismissed at the hearing.'

The practice which prevails in the courts of equity, in disposing of motions to dismiss bills because the bill does not set forth facts sufficient to constitute a cause of action, is to overrule the motion and let the case go to hearing, unless it is made absolutely clear that, taking all the allegations to be true, the bill must be dismissed at the hearing. The appellant contends that, upon the trial, it intends to go back of two of the patents, and produce such additional evidence as would result in sustaining the patent in this action.

"In view of this practice, and, further, that the bill on its face set forth facts sufficient to constitute a cause of action, we are of the opinion that the District Judge erroneously granted the motion, and the order is therefore reversed."

Without prolonging this reply brief, it is earnestly urged and contended that the ruling of the lower Court, sustaining the motion of defendant Bank to dismiss, should be reversed and the defendant Bank compelled to answer and to meet the issues set forth in appellants' (plaintiffs') second amended complaint.

Dated, San Francisco,

~~December 1~~ August 5, 1942.

Respectfully submitted,

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